No. 422

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

OFFICE EMPLOYES INTERNATIONAL UNION, LOCAL No. 11, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, ET AL., AS AMICI CURIAE

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INDEX

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INTEREST OF THE AMICI CURIAE

The *amici curiae* are the eight respondents against whom the petitioner in this Court is attempting to compel the National Labor Relations Board to pro-

ceed. By name the *amici curiae* are (1) International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO; (2) its agent, John J. Sweeney; (3) its Local No. 223, Grocery, Meat, Motorcycle and Miscellaneous Drivers; (4) its Warehousemen Local No. 206; (5) its Joint Council of Drivers, No. 37; (6) Teamster Building Association, Inc.; (7) Oregon Teamsters' Security Plan Office; and (8) William C. Earhart, administrator thereof.

Each of the *amici curiae* was named as a respondent in one or more of some four complaints in six different cases issued by the General Counsel of the National Labor Relations Board upon charges filed by the petitioner, Office Employes International Union, Local No. 11, AFL-CIO. The National Labor Relations Board dismissed all of these complaints upon jurisdictional grounds, *sub nom Matter of Oregon Teamsters' Security Plan Office,* 113 NLRB 987 (R. 229a-236a). The court below affirmed the Board's order of dismissal in an opinion reported in 235 F. 2d 832 (R. 261-266).

The *amici curiae* were not named as parties in the court below. Applications for leave to intervene there in support of the Board's order of dismissal were made by six of the *amici curiae,* all except the Oregon Teamsters' Security Office, and William Earhart, administrator thereof. The court below denied leave to intervene and ordered that in lieu thereof briefs as *amici curiae* would be accepted. The six did file a brief *amici curiae* below.

It is thus obvious that each of the *amici curiae* has the same interest in supporting the judgment below

affirming the order of the Board dismissing unfair labor practice proceedings, as any respondent in Board proceedings has in preserving an exculpatory order in his favor obtained from the Board or the courts.

The *amici curiae* have an even more direct interest in presenting to this Court their views in support of the Board's order of dismissal than usually exists when the Board is defending its order. Counsel for the Board in opposing certiorari and in defending the Board's order in the court below ignored completely the finding upon which the majority of the Board based its action, namely, the finding by the then Chairman Farmer and the then Board member Peterson "that the initial requirement for assertion of Board jurisdiction over the operations of the Respondents—effect upon commerce within the meaning of the Act—has not been established" (R. 234a). We have not seen the Board's brief on the merits and do not know what will be its position in this Court with respect to the above quoted finding. In view of the fact that neither the above mentioned chairman nor the above mentioned Board member is presently serving on the Board, there is no reason for us to suppose that their finding will be presented to the Court by the counsel for the Board.

With respect to the opinion of the third member of the Board who joined in the order dismissing proceedings against the *amici curiae*, Board Member Murdock, counsel for the Board has not ignored his position but briefed the opposite view. Board Member Murdock construed the word "employer" in Section 2 (2) of the National Labor Relations Act (29

U.S.C. 152 (2)) as excluding all the activities of a labor organization in furtherance of traditional trade union objectives and as including only activities of a labor organization devoted to the operation of business or commercial enterprises (R. 236a-239a).

The *amici curiae* believe that both the finding of the majority that the requisite effect on commerce had not been established and the construction of Board Member Murdock of the word employer as not embracing non-commercial activities of a labor organization, are proper and should be sustained by this Court. The *amici curiae* so urged in their brief in the court below. While the questions before this Court pose solely the issue of whether the Board abused its discretion in failing to exercise jurisdiction, if the majority of the Board was correct in its finding that it had no jurisdiction, the questions with respect to abuse of discretion must be answered in favor of the Board. And if our arguments that the Board correctly held that it had no jurisdiction do not convince the Court, they serve to show that at the very least the Board did not abuse its discretion in dismissing.

Two of the *amici curiae,* the Oregon Teamsters' Security Plan Office, and William C. Earhart, administrator thereof, are neither labor organizations, nor officers nor agents of labor organizations. Earhart is the administrator designated by a bi-partisan board of trustees, half of whom are chosen by the employer and half by the union, to determine as a neutral whether claims against health and welfare funds are meritorious and to pay such as he deems proper (Tr. 121-124, 362). Although there is no evidence in the record that any employer contributing health and welfare funds is engaged in an industry affecting commerce within the

meaning of Section 302 of the Labor Management Relations Act, the record does show that the office has been set up and Earhart and his staff appointed in strict accord with that section (R. 87a-88a, Tr. 46, 56, 105-108, G. C. Exh. No. 2). Section 302 would subject both employer and union representatives to criminal sanctions if any employer contributing funds for health and welfare were engaged in an industry affecting commerce, and Earhart or any member of his office staff engaged in determining the merits of claims was other than the "neutral" required by subsection (c)(5)(B) of Section 302 (29 U.S.C. 186 (c)(5)(B)). The Oregon Teamsters' Security Plan Office is nothing more than a name used to designate the neutral office and staff which Earhart uses in administering welfare funds (R. 87a-89a, Tr. 58-59). The record fails to show that anyone ever claimed that the Office or Earhart was a labor organization or the officer or agent of a labor organization. The complaints did not allege them to be such; both the Office and Earhart disclaimed such a character (*e.g.*, Transcript of Oral Argument before Board, pp. 14, 22); the Board made no findings that they were labor organizations or officers or agents of labor organizations.

The "Questions Presented" as stated both in the Petition for a Writ of Certiorari, page 2, the Brief of the Petitioner on the merits, page 2, and the Brief of the National Labor Relations Board in Opposition, page 2, are limited to the "labor organizations." We are unable to find anything in the Petition for A Writ of Certiorari which manifests any intention to bring before this Court for review the propriety of the Board's order of dismissal as to the Oregon Teamsters' Security Office and Earhart, its administrator. *Amici curiae*, accordingly, urge upon this Court that, what-

ever its ruling may be with respect to the Board's jurisdiction over labor organizations, it make clear that such ruling has nothing to do with the Oregon Teamsters' Security Office and Earhart, its administrator, and that the judgment below insofar as it affirmed the Board's dismissal against these two respondents has not been reviewed by this Court.

Despite the absence of any suggestion in the Petition for a Writ of Certiorari that any issues relating to the Oregon Teamsters' Security Office and Earhart were being brought before this Court for review, the brief in opposition to certiorari filed by counsel for the Board, made several references to the Office and Earhart on the apparent assumption that the Petition for a Writ of Certiorari sought to bring the propriety of the Board's dismissal as to them before this Court (see Brief of National Labor Relations Board in Opposition, p. 3, n. 2, pp. 4, 5).[1] And the Brief of the Petitioner on the merits (p. 3, n. 1, p. 4, n. 2) indicates that petitioner, even though there is no record support for the proposition, is nevertheless, loosely thinking of the Security Plan Office as a part

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[1] The amount of health and welfare funds collected and the amounts paid as premiums to purchase insurance for health and welfare cannot properly be considered in determining jurisdiction over the International Teamsters Union, its affiliates and agents, because, after denying the motions of the several counsel for their respective clients to sever the cases and try them separately (Tr. 97-98, 100), the Trial Examiner ruled that evidence of a jurisdictional character based on the health and welfare funds would be received only as evidence relevant to the Office and Earhart and would not be considered as evidence applicable to the other respondents (Tr. 102-103, 106-107). Both the Trial Examiner in his Intermediate Report (R. 85a-98a) and majority (R. 232a-234a), as well as dissenting members (R. 346a-247a) strictly observed this dichotomy.

of the Teamsters' Union. Without any intent to waive our position that no issue relating to the Office or Earhart, its administrator, is before the Court, we have, out of an abundance of caution, set forth our views as to why neither was subject to the jurisdiction of the Board.

Finally, the International Brotherhood of Teamsters, its affiliates and officers, quite apart from their position as respondents who will be subject to further proceedings before the National Labor Relations Board if the judgment below is reversed, are interested as members of the labor movement in defeating any construction of the law which would deprive unions of the right to conduct their traditional labor union activities through zealots for their cause.

It is inconsistent with the entire purpose of the National Labor Relations Act to hold that a labor union must not discriminate in the employing of union organizers, negotiators or confidential secretaries against persons because they hold anti-union views or adhere to competing unions. Yet that is the inevitable result which necessarily follows if a labor organization with respect to its traditional trade union activities is held to be an employer whose labor relations with its own employees affect commerce within the meaning of the Act. We believe it is clear from the legislative history of both the original national Labor Relations Act and the Labor Management Relations Act that Congress never intended the Act to be so construed. And if Congress did so intend, we urge that the First Amendment to the Constitution of the United States protects those who would proselytize for a cause or way of life from being required by law to hire or retain in their employment, as part of their

proselytizing staff, persons who are for any reason regarded as disloyal to that cause or way of life.

STATEMENT OF THE CASE

The Issues of Jurisdiction as Framed by the Complaints and Answers

The General Counsel in issuing complaints alleged that each of the respondents was an employer within the meaning of Section 2 (2) of the Act (R. 13a, 33a, 43a, 51a). He premised commerce jurisdiction as to each of the respondent locals of the Teamsters Union solely upon allegations that the locals represented employees of employers who were engaged in commerce within the meaning of the Act (R. 13a, 32a, 33a). He premised jurisdiction over the respondent International Teamsters Union upon allegations that it had locals in every state of the United States and in Canada, had officers, representatives and employees on duty throughout the United States and Canada, and had an annual revenue in excess of $700,000 derived from dues, initiation fees and sales of supplies to locals (R. 31a, 33a-34a, 50a). He premised jurisdiction over the respondent Security Plan Office and Earhart, its administrator, upon allegations that it received in Portland, Oregon, funds from employers in both Oregon and Washington and transmitted insurance premiums of more than $1,000,000 annually to, and received more than $50,000 for expenses from, the Occidental Life Insurance Company of California at San Francisco (R. 12a, 51a). The General Counsel premised jurisdiction over the respondent Building Association upon the above allegations with respect to the interstate character of the locals, the International and the Security Fund, who were tenants in

an office building in Portland, Oregon owned by the Association (R. 32a-34a).

The International Teamsters Union (R. 73a, 33a, 76a, 43a) the Joint Council 37 (R. 66a, 67a, 43a) the Building Association (R. 60a-61a, 33a) and the various Teamster locals (R. 18a, 13a, 64a, 33a) each denied the various allegations charging it with being an employer within the meaning of Section 2 (2) of the National Labor Relations Act (R. 13a, 33a). The Security Plan Office, and Earhart, its administrator denied the allegations that the Security Plan Office or Earhart, its administrator, was an employer within the meaning of Section 2 (2) of the Act (R. 13a, 21a) and further alleged specifically that the Security Plan Office and Earhart, its administrator, were not subject to the Act (R. 18a). Each of the respondents by its answer denied that it was engaged in commerce within the meaning of the Act (R. 18a, 21a, 60a, 61a, 66a-67a, 73a, 76a). The respondent locals disclaimed any knowledge of, and therefore denied, the interstate character of the employers whose employees they represented (R. 18a, 63a-64a.)

The Evidence With Respect to Jurisdiction Introduced at the Hearing

At the hearing the General Counsel failed to offer any evidence to support his allegations that the Teamsters locals named as respondents represented any employees of employers engaged in commerce within the meaning of the Act. He also failed to introduce any evidence to show that any of the parties to the health and welfare plans administered by the Security Plan Office were employers engaged in an industry affecting commerce. The General Counsel likewise failed to offer

any evidence to show that a stoppage of any of the respondents' operations by labor strife would affect the flow of commerce.

Rather the General Counsel established only the monetary transactions implicit in the conduct by the Teamsters and its affiliates of traditional trade union activities and by the Security Plan Office and Earhart, its administrator, of his duties in paying claims. Thus the General Counsel showed that in the year prior to the hearing the International Teamsters Union collected $5,755,232 in dues from some 1,204,477 members located throughout the United States, Alaska, Hawaii, Canada and the Canal Zone (R. 85a-86a). Local 206 collected $156,839 from 2,750 members and remitted $46,786 to the International (R. 86a) and Local 223 collected $32,468 from 600 members and remitted $7,258 to the International (R. 86a). He showed that during the same period Joint Council of Drivers, No. 37, was comprised of 23 Teamsters locals, 21 in the State of Oregon, and 2 in the State of Washington, and collected $177,645 in per capita taxes from its constituent locals, of which $8,609 represented per capita from locals in the State of Washington (R. 86a).

While the merits of the unfair labor practices charged are not before this Court for review, the evidence introduced to support the charges established the typical trade union character of the operations of the various respondent labor organizations and of the jobs performed by the employees here involved, as well as the impossibility of any substantial interruption to commerce resulting from labor strife among these employees. The International was not charged with having committed unfair labor practices against

any of its own employees. Indeed it is clear from the record that the only employee the International had in Portland, Oregon, was its organizer and international representative, John J. Sweeney, who was himself made a respondent in one of the complaints in his capacity as the agent through whom the International acted when it committed unfair labor practices (R. 49a-53a). The International was charged with, and the General Counsel attempted to prove it guilty of, having dominated its own Local 223, and of having interfered with, restrained, coerced and discriminated against employees of the other respondents, on the theory that the other respondents acted under the direction of the International when they committed unfair labor practices (R. 34a-36a, 44a-45a, 52a-54a). There was no evidence however, that the International was responsible for any of the unfair labor practices allegedly committed by the other respondents except insofar as the International in its capacity as principal was responsible for the acts of its agent, the respondent John J. Sweeney (R. 34a-36a, 44a-45a, 52a-53a, 128a-129a, 138a-139a, 150a, 161a, 181a-183a). In turn the evidence showed at most that Sweeney was responsible for the conduct of Local 223, as a consequence of the fact that as trustee in charge of the affairs of Local 223 he had appointed the Secretary who committed the acts proved against it (R. 181a).

With respect to said Local 223 the General Counsel charged, and attempted to prove, that the local violated Section 8 (a)(2) of the Act by dominating itself (R. 36a, 179a-180a). Local 223 had no full time employee, but only one part time employee, Manning, who served as "secretary-bookkeeper" for four Team-

sters locals, only one, Local 223, being a party in this case (R. 179a; Tr. 757). The only evidence of unfair labor practices by Local 223 was Manning's testimony that Hildreth, the Secretary of the Local appointed by Sweeney as trustee in charge of the affairs of Local 223, asked her to join Local 223 and withdraw from Local 11 of the Office Employees (R. 179a-180a; Tr. 759-760, 1092).

Local 206 had only two employees, Mrs. Crosby and June Cook (R. 165a). Mrs. Crosby did the bookkeeping, wrote out the checks, sent out contract notices to employers, prepared contracts, and handled dictation and correspondence for the officers of the local (R. 165a, 168a). Cook waited on the window where some of the large membership of 2,750 of the Local came to pay dues in person, handled the incoming mail, distributed publications among members and kept records of dues payments, initiations and withdrawals (R. 165a). When Mrs. Crosby was unavailable, Cook substituted for her (R. 166a).

Joint Council 37 employed several full time office clerical employees (R. 130a). The only one whose duties were shown by the evidence was Irene Barnes who served as personal secretary first to Graham, secretary-treasurer of the Joint Council (R. 130a), and later to respondent Sweeney who took over Graham's former duties for the Joint Council (R. 131a). Barnes also relieved the switchboard operator (R. 132a, n. 12). The Joint Council defended its discharge of Barnes as motivated by her conduct in secreting mail from Sweeney and listening in on telephone conversations (Tr. 1127-1138, 1147-1168, 1067-1073, 610-615, 619-621, 628-632, 638-640, 648-650, 657-658).

As evidence applicable solely to the Security Plan Office and Earhart, its administrator (Tr. 106-107), the General Counsel showed (Tr. 46, 56, 57, 105-108, 121-124, G. C. Exh. No. 2) that Earhart decided merits of claims as a "neutral" appointed by a bi-partisan board of trustees under health and welfare plans set up in compliance with Section 302 of the Labor Management Relations Act (29 U.S.C. 186). In all he served as the "neutral" administrator under plans set up in some 18 collective bargaining agreements between 23 Teamsters locals, and approximately 2,000 employers located in Oregon, Washington, Idaho and Montana, and covering some 16,000 employees (R. 87a, Tr. 56-58, 108-111, G. C. Exh. No. 2). These health and welfare plans were all insured by the Occidental Life Insurance Company in Los Angeles (Tr. 67-68). Earhart maintained his office in Portland, Oregon, where he and his staff of some ten employees received claims from employees, verified physicians' reports, determined eligibility and coverage of the claim and claimant, allowed or disallowed claims, and paid those allowed (Tr. 121-123, 362). Earhart's testimony indicated that contributions from employers normally went directly into the 18 separate bank accounts set up by the trustees for each trust and that the drawing and signing of checks on these accounts to pay premiums was done by the trustees themselves, rather than by Earhart or his staff (Tr. 59-60). The size of the premiums paid to the insurance company was $2,000,000 a year (R. 88a) The record does not show the size of the return flow from the Insurance Company to meet payment of claims, though it does show that the Insurance Company remitted to Earhart 4 per cent of the premiums, or approximately $80,000

a year, for use in running the Security Plan Office (R. 88a, Tr. 63-68).

The respondent Teamsters Building Association, Inc. is a non-profit corporation owning a two story office building in Portland, Oregon, which is known as the Teamsters Building (Tr. 185). The Building Association only had one full time employee, Olstad, who worked as a telephone operator on the building switchboard which served all the building offices (R. 112a). In addition to her duties as telephone operator, Olstad processed all mail entering the building (Tr. 612-614) and had charge of the public address system (R. 121a). All of the corporation's stock is owned by six Teamster locals and all of its space is occupied by either officers or affiliates of the Teamsters Union or its affiliates or by the Oregon Teamsters' Security Plan Office (R. 87a, 89a). The officers and affiliates of the Teamsters Union use their space solely for traditional trade union activities as hereinbefore described. The Security Plan Office uses its space solely for processing and paying employee claims under health and welfare plans (Tr. 103-104, 121-124). The entire income of the Building Association is derived from the rental of building space to its above described tenants and during the year ending June 30, 1954, this rental income totalled $49,767 (R. 87a).

The Building Association had difficulties with its only employee, Olstad, as the result of complaints of the various Teamster officials who had offices in the building that she was listening in on their telephone calls (Tr. 593-595, 598-609, 649-654, 1108-1111, 1121, 1123-1124, 1172-1176). Admittedly several of the Teamsters officials installed private phone lines in their offices in the Teamsters Building and others

threatened to do so because of their distrust of Olstad (Tr. 593-594, 606-607, 651-653, 1111). Admittedly the Building Association was concerned by its tenants' dissatisfaction with the switchboard service it had set up as part of the facilities afforded tenants (Tr. 593-594). It is not clear from the record whether the Teamsters' officials believed that Olstad's sympathies with a competitor union,[2] the petitioner Office Employees Local Union 11, or some notion she could further her own interests, prompted her listening in on calls.

The record indicates that the trade union activities of the labor organizations owning and using the Teamsters Building were hampered by their distrust of Olstad's loyalty (Tr. 593-594, 651, 653). It also shows that the duties attached to her job were such that the Teamsters officers and affiliates could only function effectively if they are performed by an individual whose loyalty to the Teamsters they did not question. The same is true of the types of work performed by each

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[2] Counsel for the petitioner, Office Employees Local 11, admitted at the oral argument of this case before the Board (pp. 45-46) and the evidence shows that in the Portland, Oregon area the Teamsters Union and the Office Employees Union were competing in the organizing of office employees. Indeed at the very time the alleged unfair labor practices occurred the National Labor Relations Board was conducting at least two elections in Portland or environs with locals of the Teamsters and locals of the Office Employees on the ballot as competing labor organizations (Tr. 300-304, 388-389). Numerous Board cases attest to the fact that the Teamsters often organizes and represents office employees, especially where it represents the production and maintenance employees, truck drivers, warehouse employees or some other unit of the same employer. Cf. *Southeastern Motor Truck Lines*, 113 NLRB 1122, 1131-1132 decided on day after Board order issued in instant case; *J. E. Fallin Motor Transportation, Inc.*, 114 NLRB 1369; *Walgreen Co.*, 13-RC 5277 election held December 12, 1956 and Teamsters Union certified for unit containing office employees.

of the employees of labor organizations which are described in the record, the personal secretary to union officers, the dues collection clerk, and others as hereinabove described. The testimony showed that the officers of labor organizations here involved regarded the work of these employees as highly confidential (Tr. 618-619, 1109). Their confidential character was urged upon the Board at oral argument before it (Tr. Oral Argument, p. 70).

The Board's Decision

The majority of the Board, the then Chairman Farmer and the then Board Member Peterson, held that with respect to their own employees labor organizations are "employers" within the meaning of Section 2(2) of the Act (R. 232a). They however found "that the initial requirement for assertion of Board jurisdiction over the operations of the Respondents—effect upon commerce within the meaning of the Act—has not been established" (R. 234a). (In the latter connection they pointed out that there was no inconsistency between the finding that the labor unions were employers within the meaning of the Act and the finding that they were not subject to the jurisdiction of the Board because their operation did not affect commerce. Thus then Chairman Farmer and then Board Member Peterson stated (R. 233a):

> "Demonstrably, the mere inclusion of labor unions in the statutory definition of 'employer' does not constitute a legislative ukase that, in all instances, their operations affect commerce and that assertion of the Board's jurisdiction over unions will effectuate the policies of the Act.
>
> "We consider the limited inclusion of labor organizations in the Act's definition of an 'em-

> ployer' to be consistent with the undisputed legislative intent to empower the Board to decide, pursuant to appropriate jurisdictional standards, whether to assert jurisdiction over particular employers, thus leaving the Board free to determine whether the operations of a union-employer, like any other employer, affect commerce within the meaning of the statute, and, if so, whether Board assertion of its jurisdiction over such operations will effectuate the policies of the Act."

The then Chairman Farmer and the then Board Member Peterson also determined that it would not effectuate the policies of the Act to assert jurisdiction over the respondents (R. 230a).

In appraising the impact of strife among employees of the respondent upon commerce, the majority pointed out that the "relevant transactions of the Respondent International and its Locals" consisted of "interstate transmission" of dues and fees; of the Security Plan Office of sending of insurance premiums across state lines to an insurance carrier; and that the Joint Council and Building Association "have virtually no interstate inflow or outflow of funds" (R. 233a). The majority further found that the respondents' activities were entirely devoted to "advancement of employee interests" by non-profit and non-commercial transactions, which in their relationship to commerce fell in the same class as the activities of other non-profit and non-commercial organizations whose activities have never been deemed to affect commerce sufficiently to bring them under the Board's appropriate exercise of jurisdiction (R. 234a).

A third member of the Board, Murdock, construed the language of Section 2 (2) of the Act as excluding labor organizations from the definition of employer

except when unions engaged in business enterprises. He based this conclusion upon the legislative history of this section (R. 236a-238a). He stated his conclusion therefrom as follows (R. 236a):

> "Congress did not intend, either in the Wagner Act or the Taft-Hartley Act, to regulate relations between unions and such employees as they utilize in their normal collective bargaining activities. When a union leaves its normal role as a collective bargaining agency, and embarks on a commercial enterprise, however, it obviously cannot carry into that field its immunity as a collective bargaining agency."

Accordingly, the three above-mentioned, then Chairman Farmer, then Board Member Peterson and Board Member Murdock joined in dismissing upon jurisdictional grounds, and without consideration of the merits, all the complaints issued against the eight *amici curiae* (R. 236a).

Two Board members, Rodgers and Leedom, dissented. They deemed that the statutory inclusion of labor organizations in the definition of employer constituted a Congressional direction to the Board to assert jurisdiction over labor organizations irrespective of the impact of their activities upon commerce (R. 243a). They further stated, that even if they accepted the majority's position with respect to the labor union respondents, they would nevertheless assert jurisdiction over the Security Plan Office as they believed it was engaged in commercial insurance transactions of the same kind, size and relationship to commerce as those over which the Board regularly exercised its jurisdiction (R. 247a).

The Opinions in the Court of Appeals

The court below affirmed the Board's order (R. 265a). In an opinion by Circuit Judge Prettyman, joined by Circuit Judge Danaher, the court held that the Board had properly construed Section 2(2) of the Act as placing labor organizations in their relations with their own employees in precisely the same status as other employers. (R. 263-264). It held that the Board did not abuse its discretion by applying to labor organizations the same jurisdictional criteria applicable to non-profit organizations generally (R. 264). The gist of the court's opinion appears in the following paragraph (R. 264):

> "The conclusions of the Board with reference to the non-profit character of these labor organizations, the reasoning with which it supports its criteria for jurisdiction, and the applicability of those criteria to the Teamsters are rational. We cannot say they are arbitrary or capricious. Our function in these areas of administrative discretion goes no further."

Circuit Judge Bazelon dissented. He viewed the specific reference to labor organizations in Section 2 (2) of the Act as differentiating them from non-profit organizations generally (R. 265). For that reason he believed the Board "erred in applying" to labor organizations the "standards governing non-profit organizations generally as a basis for refusing to assert jurisdiction" (R. 265).

SUMMARY OF ARGUMENT

I.

Upon the evidence introduced, the National Labor Relations Board had no alternative but to dismiss the complaints against the *amici curiae*. Congressional intent as to the kind of commerce encompassed by the Act and congressional intent as to the kind of activities of employers which it desired to reach both established that the activities of the labor organizations here involved were not covered by the National Labor Relations Act, as amended. The express statutory requirement of Section 302(c)(5)(B) of the Labor Management Relations Act that the persons selected by trustees to administer health and welfare funds must be neutral excludes application of the National Labor Relations Act to relationships between the Security Plan Office, its administrator Earhart and his employees.

A. The express provision in Section 2(2) of the National Labor Relations Act that labor organizations when acting in a capacity other than that of a labor organization shall be considered employers for the purposes of the Act, does not confer on the Board jurisdiction to proceed in such instances without regard to effect upon commerce. Section 10 (a), (b) and (c) of the Act empowers the Board to proceed only where the unfair labor practices charged affect commerce and directs the Board to dismiss all complaints where upon the preponderance of the evidence, no unfair labor practice affecting commerce has been established.

The finding of Chairman Farmer and Board Member Peterson that the record did not establish the jurisdictional prerequisite of effect on commerce is correct irrespective of whether or not the *amici curiae* fall

within the non-profit organization exclusion which these two Board members deemed applicable. The absence of any evidence that any of the activities of the *amici curiae* here involved related to employees of employers engaged in commerce within the meaning of the Act necessitated the finding that the requisite effect on commerce had not been established. The relationship to commerce of the employer of the employees whom the union represents or attempts to represent was the test of the Board's jurisdiction over labor organizations as such under both the original National Labor Relations Act and the Labor Management Relations Act. But even if the usual test applicable to determine jurisdiction over labor organizations did not apply, when the proceeding was against a labor organization qua employer, the evidence was equally insufficient to meet the jurisdictional test applicable to employers, namely that a stoppage of its operations by labor strife would burden or obstruct commerce. Even where a labor organization represents employees engaged in commerce it would be purely speculative and conjectural to suppose that a strike of office employees of a labor organization would have any effect on commerce via the employees of the employer engaged in commerce. The only possible effect of a strike of the office employees of the respondent unions discernible from the record in this case is on the flow of union dues from locals to parent bodies. This obviously is not the kind of effect on commerce to which the Act is applicable.

The finding of Chairman Farmer and Board Member Peterson that the record did not establish the jurisdictional prerequisite of effect on commerce is likewise proper on the basis upon which these two members

placed it, namely, that the traditional trade union activity of labor organizations fell in the category of non-commercial activities of non-profit organizations, which Congress intended to exclude from the Act as not affecting commerce. The legislative history of the Labor Management Relations Act establishes that Congress did not amend the Act to exclude non-commercial activities of non-profit organizations only because it considered that such activities did not affect commerce. In committee reports and on the floor of Congress it was stated that no one had ever regarded the non-commercial activities of non-profit organizations as commerce. Labor organizations are non-profit organizations. Their traditional trade union activities are not commercial or business ventures.

B. The determination of Board Member Murdock that a labor organization became an employer within the meaning of Section 2(2) of the Act only when it extended its activities beyond those traditional to trade unions and embarked upon a business or commercial enterprise, is proper. The legislative history shows that Congress was urged to include labor organizations in the definition of employer because otherwise they could employ workers in all sorts of business activities at a competitive advantage over other employers. The Committee report that labor organizations were included as employers only in the "extreme" cases where they acted as employers manifests the understanding that they did not act as employers within the meaning of the Act when engaged in usual trade union role.

The counterpart in industry of the employees here involved has never been regarded by trade unions generally, nor by Congress, nor by the Board, as within the protection of the National Labor Relations Act.

Office employees, such as secretaries and switchboard operators, serving management officials who make labor policy for industry, have always been excluded from the Act as confidential employees. Congress stated that this was the fact when it rejected proposals to write such express exclusions in the statute.

Serious constitutional questions would arise were a labor union required to hire or retain, on its collective bargaining staff, organizers, negotiators or assistants thereto, who were anti-union or pro-rival union. Just as churches and political parties have a constitutional right to hire only zealots for their causes, so a labor union in the choice of those who represent it in organizing, collecting dues, and negotiating with management has a constitutional right to insist on zealots for its particular brand of unionism. For the rights of freedom of speech and assembly guaranteed by the First Amendment encompass the right to form and operate as a trade union. Correlative thereto is the right to hire and pay for services essential to the functioning of the trade union.

C. If the health and welfare plans administered by the Security Plan Office and Earhart are financed in any respect by employers in an industry affecting commerce, Section 302 (c)(5)(B) of the Labor Management Relations Act requires that Earhart and his staff be neutral persons. This requirement of neutrality removes his staff from the protection of the National Labor Relations Act.

II.

Irrespective of whether the Board had power to assert jurisdiction over any of the *amici curiae,* the Board did not abuse its discretion in declining so to

do. The National Labor Relations Act empowers the Board to decline jurisdiction upon any non-arbitrary and non-discriminatory basis which the Board considers proper. All of the arguments which we have heretofore made to show that the *amici curiae* were beyond the jurisdiction of the Board, equally support a discretionary refusal by the Board to exercise jurisdiction.

The sole reason for singling out labor organizations for express mention in the definition of employer in Section 2(2) of the National Labor Relations Act was to be certain that they were excluded from the proscriptions which the Act directed at interference with self-organization. That, incidental to their mention for purposes of exclusion, it was deemed desirable to qualify the exemption so that in certain capacities labor organizations could be reached as employers, certainly affords no basis for inferring a Congressional intent to impose upon the Board a mandatory duty to proceed against labor organizations whenever they act in the non-exempted capacities. The statutory language places them in the same position as all other employers for purposes of the Board's exercise of discretion. If legislative history as to Congressional attitudes toward inclusion or exclusion were to be any guide, it would appear that labor unions would be among those against whom Congress was least concerned with proceeding.

Legislative intention with respect to inclusion within the Act affords no appropriate basis for fixing standards for the Board's appropriate exercise of its discretionary jurisdiction. Under such a test borderline cases where opinion as to inclusion or exclusion was divided or where specific mention was necessary to

avoid ambiguity, would assume a status directly the opposite of their real importance. The extensive legislative history as to whether employers with fewer than 10 employees should be included would, by this test, require the Board to exercise its jurisdiction over all small employers. Likewise the Board would be compelled to proceed in all cases arising in the territories.

It was entirely reasonable and proper for the Board to establish a jurisdictional standard under which the non-commercial activities of non-profit organizations are not deemed to have sufficient effect on commerce to warrant the Board's exercise of jurisdiction. This standard conforms to Congressional intent that the Board should not proceed in such cases. The determination that labor unions were subject to this standard was also reasonable and proper.

Any balancing of the factors relevant to the Board's exercise of its discretionary jurisdiction shows that the Board's failure to assert jurisdiction over the *amici curiae* was proper. On the one hand there is the Board's limited budget, comparatively small staff and large backlog of cases, with the resultant large areas of industry in which unfair labor practices having a substantial effect on commerce remain beyond the Board's exercise of jurisdiction. On the other hand there is the absence of any discernible impact upon commerce of the activities of unions in relation to their own employees, the presence of strong non-legal deterrents from unfair treatment of their own employees by unions and the availability of interunion machinery for settling such disputes as are here presented.

Finally, the standards which the Taft-Hartley Act fixes in order to assure that the violently anti-union

employee shall not be discriminated against in employment, if applied to the personnel of organizational staffs of unions, could defeat the purposes of the Act. Just as the Board has held that industrial employers may staff their labor relations personnel with persons holding the management's labor viewpoint and need not bargain with a labor union engaged in a competing business, so the Board in the exercise of its discretion may properly decline to apply the Act to employees of a labor union who join a union engaged in a competing organizational drive.

ARGUMENT

I.

THE DETERMINATION BY A MAJORITY OF THE MEMBERS OF THE NATIONAL LABOR RELATIONS BOARD THAT THE RECORD FAILED TO ESTABLISH THAT ANY OF THE AMICI CURIAE WAS SUBJECT TO THE JURISDICTION OF THE BOARD, RESTED UPON THE PROPER CONSTRUCTION OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

The three members of the National Labor Relations Board who joined in the order dismissing all the complaints against the *amici curiae* were agreed the Congress did not intend for the Board to apply the Act to the relationships between a union and its employees hired solely in connection with traditional trade union activities. Two of the three, former Chairman Farmer and former Board Member Peterson, reached this result by examining legislative intent as to the type of commerce within the Act (R. 234a), while the third, Board Member Murdock, looked to legislative intent as to the type of employer within the Act (R. 236a-238a).

Former Chairman Farmer and former Board Member Peterson based their decision upon the legislative

history as to the scope of the phrase "affect commerce" in the Act (Section 10 (a), 29 U.S.C. 160 (a)). They read this legislative history as showing that Congress deemed that the transactions of non-profit organizations did not affect commerce except in those instances in which non-profit organizations engaged in purely commercial activities. Since labor organizations are non-profit organizations, the two above named former Board members found, that in the absence of any evidence of purely commercial activities on the part of the *amici curiae*, the record failed to establish the requisite "effect upon commerce within the meaning of the Act." (R. 234a.)

Board Member Murdock examined legislative history as to the intent of Congress when it excluded from the definition of employer in Section 2(2) of the Act (29 U.S.C. 152 (2)), "labor organizations (other than when acting as an employer)." He concluded therefrom that Congress did not intend in either the original National Labor Relations Act nor in the Labor Management Relations Act to regulate relations between unions and such employees as they utilize in their normal collective bargaining activities (R. 236a).

The practical consequences of the respective approaches of the three Board members, insofar as the application of the Act to trade unions is involved, are identical. Whenever a trade union embarks on a business venture it is, as to the employees engaged in such business venture, an employer within the meaning of the Act and the impact upon commerce of its activities in the business venture are to be judged by the same standards as are applicable to any industrial employer. But so long as a trade union confines itself to organizing and collective bargaining, it

is free to maintain a staff composed of zealots for its cause, with a correlative right to discriminate against those who are anti-union or pro-rival union, without thereby subjecting itself to charges before the National Labor Relations Board.

We believe that the legislation history sustains both the view that the relationship between a union and its staff engaged in traditional trade union activities does not affect commerce within the meaning of the Act and the view that so long as a trade union does not engage in a commercial enterprise, it is within the exemption of labor organizations from the definition of employer. We believe it is entirely immaterial in this case whether this Court agrees with both these views, or with one rather than the other. Indeed we believe that the activities of the *amici curiae* here involved have such a remote relationship to interstate commerce, that the finding that the record failed to establish the requisite "effect on commerce" (R. 234a), may properly be sustained and the judgment below affirmed without the necessity of this Court's deciding the broader questions which then Chairman Farmer and then Board Member Peterson, on the one hand, and Board Member Murdock, on the other hand, considered controlling.

A.

The Finding of Chairman Farmer and Board Member Peterson That the Record Failed to Establish That the Unfair Labor Practices Charged Affected Commerce Within the Meaning of the National Labor Relations Act, as Amended, Is Correct

1. The specific inclusion of labor organizations in certain capacities within the definition of employer did not obviate the necessity for establishing as a prerequisite to Board jurisdiction that the alleged unfair labor practices affected commerce within the meaning of the National Labor Relations Act, as amended

Former Chairman Farmer and former Board Member Peterson construed the National Labor Relations Act, as amended, as imposing on the Board the duty of making a determination in each case as to whether the operations of the employer involved affect commerce within the meaning of the Act. They specifically ruled in this case that the inclusion of labor unions, when operating in certain capacities, in the definition of employer did not remove from the Board the duty of examining whether the operations of the labor union affected commerce and on the basis thereof making a judgment as to whether the Board had jurisdiction. Thus then Chairman Farmer and then Board member Peterson stated (R. 233a):

> "Demonstrably, the mere inclusion of labor unions in the statutory definition of 'employer' does not constitute a legislative ukase that, in all instances, their operations affect commerce * * *
>
> "We consider the limited inclusion of labor organizations in the Act's definition of an 'employer' to be consistent with the undisputed legislative intent to empower the Board to decide, pursuant to appropriate jurisdictional standards, whether to assert jurisdiction over particular employers, thus leaving the Board free to determine

whether the operations of a union-employer, like any other employer, affect commerce within the meaning of the Statute, and, if so, whether Board assertion of its jurisdiction over such operations will effectuate the policies of the Act."

The use of the word "Demonstrably" which begins the above quotation has reference to Section 10 (a) of the National Labor Relations Act, as amended. That section constitutes the sole authority which the Board has to proceed in unfair labor practice cases. The relevant language of that section is the first sentence which reads as follows (Section 10 (a), 29 U.S.C. 160(a)):

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce."

Section 10 (b) in providing for the issuance of complaints by the Board, makes it a condition precedent thereto that there be a charge that some person has engaged or is engaging in "such unfair labor practice." The word "such" has reference to the limitation in Section 10 (a) that the unfair labor practice must be one "affecting commerce." Similarly in Section 10 (c) the Board's power to issue an order rests on its finding from a preponderance of the evidence taken before the Board that any person named in the complaint has engaged or is engaging "in any such unfair labor practice." Finally, and crucial to this case, is the direction in Section 10 (c):

> "If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any *such* unfair labor prac-

tice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint." (Emphasis supplied.)

The word "such" preceding unfair labor practices, again obviously refers to the limitation in the empowering language of the first sentence of Section 10, that it must be an unfair labor practice affecting commerce.

The inclusion of a labor organization when acting as en employer, whatever the scope of the inclusion, does not serve to empower the Board to proceed against all labor organizations no matter how small they are nor how unrelated to commerce. Any such construction of the statute is expressly contrary to the specific language of Section 10. It finds no support in the language of the statute, the statutory scheme nor its legislative history.

When the then Chairman Farmer and then Board Member Peterson found that "effect upon commerce within the meaning of the Act—has not been established" (R. 234a), they had no alternative but to dismiss the complaints.

2. No evidence was introduced to bring any of the amici curiae within the statutory basis established by the Labor Management Relations Act for exercise by the Board of jurisdiction over labor organizations, namely, representation of, or attempt to represent, or induce action by, employees of an employer whose operations affect commerce within the meaning of the Act

The original National Labor Relations Act did not subject labor organizations as such to the processes of the Board. The only time labor organizations actually came before the Board under that Act they were either petitioning for an election to establish

themselves as the representative of employees of employers or charging that an employer had committed unfair labor practices. The test of jurisdiction was whether the employer whose employees they sought to represent or the employer charged with unfair labor practices, as the case might be, was engaged in commerce within the meaning of the Act.

When Congress amended the National Labor Relations Act and made labor organizations as such subject to unfair labor practice complaints, it retained as the sole test of jurisdiction the relationship to commerce of the activities of the employer whose employees had allegedly been involved in the union's commission of unfair labor practices.[3] In all of the provisions of the Labor Management Relations Act which purport to rest upon the commerce powers of Congress,[4] jurisdiction over labor organizations is

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[3] At the opening of the hearing before the Trial Examiner in this case, when counsel for the General Counsel indicated that he claimed jurisdiction over the locals because they represented employees of employers of interstate firms (Tr. 34-35), the Trial Examiner asked if in this regard he was suggesting the applicability of jurisdictional tests in "C B" cases, the letter designation which the Board includes as part of the docket number of complaint cases under Section 8 (b) of the Act. The counsel for the General Counsel said he was (Tr. 35). He likewise answered in the affirmative at the oral argument before the Board a query of Board Member Peterson if "the theory of counsel for the General Counsel at the outset was to prove jurisdiction on a basis similar to that adopted in the ordinary 8 (b) type of case" (Tr. Oral Argument, p. 64). Cf. *In re International Brotherhood of Teamsters (Jamestown Builders Exchange)*, 1951, 93 NLRB 386; *In re Denver Building and Construction Trades Council (B. W. Fellers Inc.)*, 1950, 88 NLRB 1321; *In re Denver Building and Construction Trades Council (William G. Churches)*, 1950, 90 NLRB 378.

[4] Section 304 of the Labor Management Relations Act, amending the Federal Corrupt Practices Act (18 USC 610), a criminal

carefully delimited to situations in which the employees whom the union represents or seeks to represent, or seeks to induce into action, are employed in an industry affecting commerce within the meaning of the Act.

In Section 301 (a) of the Labor Management Relations Act (29 U.S.C. 185 (a)) it is provided that

> "Suits for violation of contracts between an employer *and a labor organization representing employees in an industry affecting commerce,* or between any such labor organizations, may be brought in any district court" (Emphasis supplied).

In Section 301 (b) of the Labor Management Relations Act (29 U.S.C. 185 (b)) it is provided:

> *"Any labor organization which represents employees in an industry affecting commerce* as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents" (Emphasis supplied).

The provisions of the Labor Management Relations Act regulating health and welfare funds and barring bribery of, or shakedowns by, union representatives are similarly limited. The applicable section, Section 302 (29 U.S.C. 186) begins:

> "(a) It shall be unlawful for any employer to pay or deliver, or agree to pay or deliver, any money or other thing of value to *any representa-*

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section, not involving administration by the National Labor Relations Board, appears to be the only section applicable to all labor organizations as distinguished from those representing or inducing action by employees employed in industry affecting commerce within the meaning of the Act.

tive of any of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for *any representative of any employees who are employed in an industry affecting commerce* to receive or accept, or to agree to receive or accept, from the employer of such employees * * *" (Emphasis supplied).

The provisions which give injured parties a right to recover monetary damages for injuries arising from proscribed "boycotts and other unlawful combinations" are found in Section 303 (29 U.S.C. 187), which begins:

"(a) It shall be unlawful, for the purposes of this section only, *in an industry or activity affecting commerce, for any labor organization* to engage in, or to induce or encourage the employees of any employer to engage in * * *" (Emphasis supplied).

The repeated statements in committee reports and on the floor of Congress that the above quoted Section 303 gives damages in precisely the same situation as gives rise to an unfair labor practice proceeding under Section 8 (b)(4) of the National Labor Relations Act, as amended,[5] show beyond any question that Congress assumed that under the National Labor Relations Act, as amended, the jurisdictional test applicable to all labor organizations brought before the Board would be the same as it had been under the original National Labor Relations Act, namely, whether the employees whom they represented or sought to represent

[5] H. Conf. Rept. No. 510, 8th Cong., 1st Sess., on H.R. 3020, p. 67, reprinted in Legislative History of the Labor Management Relations Act (Gov't Print. Off., 1948), vol. 1, p. 571; 93 Cong. Rec. 4858, reprinted 2 Leg. His. LMRA 1371.

or induce to action were employed by an employer whose activities affected commerce within the meaning of the Act.

Nowhere in either the original National Labor Relations Act or in the amendments thereto is there any suggestion that Congress meant to reach unions on the basis of their size, or the amount of dues their locals sent to internationals across state lines, or the presence of locals in several states, or the crossing of state lines by organizers, negotiators, officers or other agents of the union. Rather the contrary is indicated by the repeated instances in which Congress so carefully made the applicability of the Act to a union depend upon the employment in an industry affecting commerce of the employees whom the union represents or seeks to represent or induce to action.

In the instant case, with respect to the jurisdiction of the Board to proceed against the Teamster locals, the complaints alleged that they represented employees of employers engaged in commerce within the meaning of the Act (R. 13a, 32a, 33a). In their answers the Teamsters locals denied that the employees whom they represented were employed by employers who were engaged in commerce within the meaning of the Act (R. 18a, 64a, 73a). At the opening of the hearing before the Trial Examiner, counsel for the General Counsel stated, as one basis of jurisdiction over the Security Plan Office and Earhart, its administrator, that he relied upon the payment of health and welfare claims to employees of employers who were engaged in commerce (Tr. 46).

No evidence was introduced at the hearing to show that any of the respondents represented employees of employers engaged in commerce within the meaning of

the Act. Nor was there any evidence that any of the employers party to the health and welfare plans administered by the Security Plan Office and Earhart were engaged in commerce within the meaning of the Act.

Accordingly we submit that the failure of the General Counsel to offer any evidence that the labor organizations here involved represented employees of employers engaged in commerce within the meaning of the Act required a dismissal upon jurisdictional grounds. The allegations of the complaints that the respondent locals did represent such employees had been denied. A fact issue requiring proof was tendered. There was a complete failure of proof. The Board could not properly do other than find as did Chairman Farmer and Board Member Peterson "that the initial requirement for assertion of Board jurisdiction over the operations of the Respondents—effect upon commerce within the meaning of the Act—has not been established." (R. 234a).

We do not mean to suggest that once it is established that a labor organization represents employees of an employer engaged in commerce within the meaning of the Act, that the Board may then properly proceed against the labor organization either as an employer or as a labor organization. As we shall show in the succeeding argument, it would still be necessary to establish that the alleged unfair labor practices themselves "affected commerce" by causing, or threatening to cause, a stoppage of the free flow of commerce, and that the activities of the union were not exempt as non-profit, non-commercial activities. But in the instant case, the entire absence of the basic proof of representation of employees employed by an employer

engaged in commerce, would seem to dispose of the case without the necessity of considering any further questions.

3. No evidence was introduced to show that the unfair labor practices charged against the amici curiae labor organizations as employers affected commerce within the meaning of the statutory basis established by the National Labor Relations Act, as amended, for the exercise by the Board of jurisdiction over employers, namely, that a stoppage of the employer's operations by reason of labor strife would burden or obstruct commerce or the free flow of commerce

a. There was no evidence that a strike by office employees of the respondent unions would disrupt or burden commerce or any flow of commerce of any kind other than the flow of union dues across state lines

Irrespective of whether or not the labor union respondents were engaged in representing employees of employers engaged in interstate commerce, a cessation of their traditional trade union activities could not affect commerce within the meaning of the Act. If none of the employers whose employees were represented by the unions were engaged in commerce within the meaning of the Act, a stoppage of union activities would have no affect on commerce via the effect on such employers. But even if the unions represented employees of employers engaged in commerce, it is impossible to see how a stoppage of the unions' activities would have any effect on commerce by reason of some supposed effect on those employers. Although at the opening of the hearing before the Trial Examiner this issue was raised, no evidence showing any effect on commerce was introduced.

The Trial Examiner indicated that he was troubled as to how a strike of employees of a labor organization could affect operations of the employers whose employees the labor organization represented (Tr. 21, 35). He stated (Tr. 21):

"I'm somewhat dubious about the commerce facts insofar as they relate to concerns with whom the Union has contractual negotiations. I think I would want to be shown where a dispute involving the office employees of Local 206 would have an effect upon these other contractual operations."

Also see the Trial Examiner's query in the following colloquy with Mr. Tillman, the representative of the General Counsel at the hearing (Tr. 35-36):

"Mr. Tillman: Well, it comes to the argument that I was just making that it's possible the Board may assert jurisdiction where a local represents employees of interstate firms, but will not assert it where they represent employees of non-interstate firms * * *

* * *

"Trial Examiner: You're drawing an analogy to a CB case where it will take jurisdiction over a union because the operations of the employer are in interstate commerce?

"Mr. Tillman: Yes, it's something of an analogy to that; * * *

"Trial Examiner: I am still troubled by your making that hurdle * * *

"Mr. Tillman: You mean as to the possible effect on these employers?

"Trial Examiner: The effect on these other employers of a dispute involving office employees in Local 206.

"Mr. Tillman: Well, I'm in the position of a layman there. It would be hard for me to know, for example, what effect it would have on the operations of the Teamsters' organization if the girls suddenly went on strike and they couldn't get any office help."

It will be noticed that whereas the Trial Examiner assumed it would be necessary to show an effect on

employers of employees represented by the union, the representative of the General Counsel directed his answer to effects on operations of the union. We believe this evasion reflects the entirely inconsequential effect which a strike by employees of a union would have on employers of the union's members.

Neither the petitioner here, nor the dissenting members of the Board, nor the General Counsel for the Board, have shown any respect in which a strike by office employees of the labor unions here involved, could have any substantial impact upon commerce within the meaning of the Act. They have neither introduced in evidence nor pointed to any facts of which the court could take judicial notice which even suggest that a stoppage of traditional trade union activities by internal disputes in the union can have the kind and quality of an impact upon commerce with which Congress was concerned when it enacted the National Labor Relations Act. There has been no history of strikes by employees of labor organizations. What effects, if any, such a strike could have are purely conjectural.

The theory of the effect of strikes on commerce which constitutes the basis for the jurisdiction of the National Labor Relations Act is fully set forth in the findings set out in Section 1 of the Act. This Court has often had occasion to advert to those findings and to restate the theory in its decisions. This theory, of course, is that a strike stopping the operations of an industrial employer shuts off the inflow of raw materials to his plant and the flow of finished goods from the plant. An employer engaged directly in commerce or receiving or producing goods which cross state lines affects commerce when he denies his employees the

right to organize and bargain collectively, because such a denial has led and tends to lead to a stoppage of work by them with the resultant impediment to commerce. *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 1937, 301 U.S. 1, 22 n. 2, 41-43; *N.L.R.B.* v. *Friedman-Harry Marks Co.*, 1937, 301 U.S. 58, 72-73; *Santa Cruz Packing Co.* v. *N.L.R.B.*, 1938, 303 U.S. 453, 463-466. An interruption in the usual operations of a union from internal union disputes which were not the kind which would involve employees of industrial employers in work stoppages would not affect the flow of commerce. An interruption in the operations of a union by external employer forces threatens commerce because the employer's employees may resent the interference and strike. Neither the petitioner, the General Counsel, nor the dissenting members of the Board have ever advanced any explanation as to how labor strife on the part of the employees here involved could effect commerce within the meaning of the Act.

b. A stoppage of the flow of union dues across state lines is not the kind of an effect on commerce at which the National Labor Relations Act, as amended, is directed.

The only possible effect upon commerce of a strike of the employees of the respondent unions which appears from the record, would be a stoppage of transmission of union dues across state lines. The amounts of dues transmitted across state lines to and from the Teamsters Building in Portland, Oregon during the year preceding the hearing were $46,786 in per capita taxes sent by respondent Local 206 to the International Teamsters Union in Washington, D. C., $7,258 similarly sent by respondent Local 223, and $8,609 received by Joint Council of Drivers No. 37 from locals in the State of Washington (R. 86a).

Everything which we state in our next subsection of this brief in support of our argument that Congress did not intend the Act to apply to the non-profit organizations so long as they do not engage in business enterprises, demonstrates that an interruption in the flow of union dues across state lines is not the kind of commerce Congress encompassed within the Act. In *Polish National Alliance* v. *N.L.R.B.*, 1944, 322 U.S. 643, 644-645, 648, this Court showed its understanding that the interstate transmission of money, letters and personnel was not the kind of commerce with which the Act dealt. This Court pointed out that for the preceding five years Polish National had admitted no more "social members" but sold only life insurance (322 U.S. at 644-645). And it held that the mere fact Polish National engaged in cultural and fraternal activities did not subordinate its extensive business activities to such insignificance as to withdraw them from regulation by the National Labor Relations Board (322 U.S. at 648).

In the instances with which Congress was concerned when it considered non-commercial activities of non-profit organizations, dealings between non-profit organizations and non-members involving the payment of money for services or goods were often involved. E.g., the case of *N.L.R.B.* v. *Central Dispensary,* App. D.C., 1944, 145 F. 2d 852, certiorari denied, 324 U.S. 847, which provoked the Congressional clarification of its intent respect non-profit organizations (see legislative history collected, pp. 47-50 *infra*), involved the sale of medical services and supplies for a revenue in excess of $600,000 a year (145 F. 2d at p. 858). Here the unions do not receive revenue for the sale of goods or services to others. Their interstate financial

transactions consist merely of collecting and transmitting dues from their own members. Irrespective of the correctness of our argument that non-commercial activities of non-profit organizations are not commerce within the meaning of the Act, certainly the collection of dues from members of a welfare organization and transmission of dues to the parent organization was not the kind of commerce with which Congress was concerned when it enacted the National Labor Relations Act.

4. Congress did not intend that the activities of nonprofit organizations not engaged in commercial enterprise should be considered as affecting commerce within the meaning of the Act.

The language in Section 1 of the original National Labor Relations Act, and again in Section 1 of the Labor Management Relations Act strongly indicates that the law was directed solely at business and industrial enterprises. Section 1 of the National Labor Relations Act begins (29 U.S.C. 151):

> "The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by
>
> "(a) impairing the efficiency, safety or operation of the instrumentalities of commerce;
>
> "(b) occurring in the current of commerce;
>
> "(c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or

"(d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce."

The section continues stating that inequality of bargaining power tends to aggravate "recurrent business depressions" and prevents "stabilization of competitive wage rates and working conditions within and between industries." The section recites that protection by law of the right to organize and bargain collectively removes sources of "industrial strife" by encouraging the friendly adjustment of "industrial disputes."

Section 1 (b) of the Labor Management Relations Act (29 U.S.C. 141 (b)) begins its declaration of policy as follows:

"Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized * * *"

Such phrases as "industrial strife or unrest", "instrumentalities of commerce", "flow of raw materials or manufactured or processed goods from or into the channels of commerce", "business depressions", "production of articles and commodities for commerce", "within and between industries", "industrial disputes", are inapplicable to the noncommercial activities of non-profit associations. In several state court decisions construing state labor relations acts modelled upon the original National Labor Relations Act the use of such phrases as those above quoted afforded in large measure the basis for construing the state act as inapplicable to nonprofit

organizations. Congress was familiar with these decisions at the time it considered and decided that the original National Labor Relations Act was already inapplicable to the noncommercial activities of non-profit organizations and hence need not be amended to exclude them.[6] The National Labor Relations Board has cited these decisions in dismissing proceedings against non-profit organizations.[7]

In *Petition of Salvation Army*, 1944, 349 Pa. 105, 36 A. 2d 479, the Supreme Court of Pennsylvania held that the Pennsylvania State Labor Relations Board had no power to conduct an election among hotel and restaurant employees of The Evangeline Residence in Pittsburgh which the Salvation Army operated as a home for young working girls and out-of-town school girls. The fees charged were estimated to cover the costs of operations but the operation was not conducted for profit. The Supreme Court of Pennsylvania stated (36 A. 2d at 481):

> "In the light of these plainly expressed legislative findings declaring the necessity for the law and the mischief to be remedied, we are drawn irresistibly by the language used to the conclusion that the Legislature meant to limit its provisions to industrial disputes. The phrases: 'within and between industries', 'sweat shops', 'production

[6] The legislative history is set out in full pp. 47-50, *infra*. For Congressional acquaintance with these decisions see Statement of John H. Hayes, President of the American Hospital Association. Hearings before Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess., pp. 2181, 2182; H. Rept. No. 245 on H.R. 3020, 80th Cong., 1st Sess., p. 12, reprinted 1 Leg. His. L.M.R.A. 303; 93 Cong. Rec. A1009, reprinted 1 Leg. His. L.M.R.A. 580.

[7] E.g., *The Trustees of Columbia University*, 1951, 97 NLRB 424, 427, n. 16.

and consumption', 'business depressions' and 'industrial strife and unrest' certainly do not relate to charitable or eleemosynary assocations. It appears too plain for argument that the Legislature intended all of the statutory provisions and regulations of the Act to apply exclusively to industrial disputes.

* * *

"We do not mean to decide or imply that whenever a non-profit organization does enter an industrial field, even though its profits may be devoted to charity, it is exempted from taxes and regulations such as the Labor Relations Act to which any other industry or business is subjected. Compare: Y.M.C.A. of Germantown v. Philadelphia, 323 Pa. 401, 187 A. 204, in which the Y.M.C.A. rented commercially part of its premises to lodgers; Contributors to the Pennsylvania Hospital v. County of Delaware, et al., 169 Pa. 305, 32 A. 456, in which a private hospital operated farms for profit; American Sunday School Union v. Philadelphia, 161 Pa. 307, 29 A. 26, 23 LRA 695, in which a Sunday school union conducted a book store for profit; Trustees of Columbia University, etc. v. Herzog, Misc. , 46 NYS 2d 130, in which a university owned and operated an office building."

Similarly, in *St. Luke's Hospital* v. *Labor Relations Commission*, 1946, 320 Mass. 467, 70 N.E. 2d 10, the court in holding the Massachusetts Labor Relations Act inapplicable to a hospital, said (70 N.E. 2d at 12-14):

"The policy of that act, as already intimated, is the promotion of peace and the prevention of strikes in order that there may be no obstructions to the free flow of industry and trade * * * The act, however, does not include all employees working in this Commonwealth, apart from those

covered by acts of Congress, anymore than does the National Labor Relations Act * * * include any except those engaged in pursuits where a strike would affect interstate commerce. * * * Our act impliedly excludes from the Commission jurisdiction over matters not affecting industry and trade. * * *

"A hospital, like the plaintiff, whose doors are wide open to those needing medical and surgical treatment for which no charge is made to those unable to pay, and which depends for its support and maintenance upon the fees of patients and gifts and donations and cares for recipients of public welfare sent to it by the city at reduced rates and is conducted in the interests of the general public and strictly as a non-profit organization is a public charity. * * * Such a hospital is not conducting a business or commercial enterprise. It is not engaged in industry or trade. * * * We need not consider what the relationship of the hospital to industry and trade would be if it were engaged in commercial undertakings, as the care and letting of realty or the conduct of a mercantile establishment, for the benefit of the hospital and employed persons in such undertakings. * * *

"But it is urged by the Commission that a hospital comes within the definition of an employer, and is not expressly exempted * * * But the entire chapter in which the definition appears must be construed as a whole, and the question is not whether a hospital is expressly exempted but whether a hospital comes within the sweep of the chapter in the light of its declared underlying and predominant aim and object. * * *

"* * * A strike would not affect industry or trade in any of the four ways mentioned in section 1, which defines the policy of the act. The policy limits the scope of the act and clearly shows that a hospital which is organized and conducted as

public charitable institution is not covered by the act. This conclusion is in accord with Jewish Hospital of Brooklyn v. Doe, 252 App. Div. 581, 300 N.Y.S. 1111; * * *"

The "four ways" in which a strike would affect industry or trade, set forth in section 1 of the Massachusetts State Labor Relations Act, are exactly the same "four ways" set forth in the first paragraph of Section 1 of the National Labor Relations Act and quoted above. Cf. Annotated Laws of Massachusetts, Ch. 150 A, Sec. 1 with 29 U.S.C. 151.

To the same effect as the foregoing cases see *Western Pennsylvania Hospital* v. *Lichliter,* 1941, 340 Pa. 382, 17 A. 2d 206; *Philadelphia* v. *Lichliter* (Pa. Ct. of Com. Pleas, 1944), 55 Dauph. Co. 184; *Washington & Jefferson College* v. *Gifford* (Pa. Ct. of Common Pleas, 1944), 55 Dauph. Co. 182. Cf. *Jewish Hospital of Brooklyn* v. *Doe* (Sup. Ct., App. Div. 2nd Dept. 1937), 252 App. Div. 581, 300 N.Y.S. 1111; *American Society for Prevention of Cruelty to Animals* v. *Geiger,* 1955, 208 Misc. 29, 141 N.Y.S. 2d 610.

Under the original National Labor Relations Act the Board had exercised jurisdiction in one case involving a nonprofit hospital. *N.L.R.B.* v. *Central Dispensary,* App. D.C. 1944, 145 F. 2d 852, certiorari denied, 324 U.S. 847. During the hearings which preceded the enactment of the Labor Management Relations Act, Congress received requests from hospitals that the Act be amended to exempt nonprofit hospitals. Hearings before Senate Committee on Labor and Public Welfare, 80th Con., 1st Sess., pp. 2181, 2241. The Hartley Bill as reported out of Committee and as passed by the House of Representatives

would have amended the National Labor Relations Act to exclude from the definition of employer in Section 2 (2) the following (H.R. 3020, 80th Cong., 1st Sess., as reported, reprinted 1 Leg. His. L.M.R.A. 34; H.R. 3020, 80th Cong., 1st Sess., as passed House, reprinted 1 Leg. His. L.M.R.A. 161):

> "any corporation, community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation."

The report accompanying this amendment stated (H. Rept. No. 245 on H.R. 3020, 80th Cong., 1st Sess., p. 12, reprinted 1 Leg. His. L.M.R.A 303):

> "Churches, hospitals, schools, colleges, and societies for the care of the needy are not engaged in 'commerce' and certainly not interstate commerce. * * * The bill therefore excludes from the definition of 'employer' institutions that qualify as charities under our tax laws. In this respect the bill is consistent with similar laws in a number of States, notably New York, Pennsylvania and Wisconsin."

The Senate Committee rejected this amendment, not because it disagreed with it, but because it regarded it as unnecessary. This is apparent from the statement made by Senator Taft on the floor of Congress when Senator Tydings proposed on the floor to restore in part the exemption adopted by the House but rejected by the Senate Committee. Senator Taft stated

(93 Cong. Rec. 4997, reprinted 2 Leg. His. L.M.R.A. 1464):

> "The committee considered this amendment, but did not act on it, because it was felt it was unnecessary. The committee felt that hospitals were not engaged in interstate commerce, and that their business should not be so construed. We rather felt it would open up the question of making other exemptions. That is why the committee did not act upon the amendment as it was proposed."

Senator Tydings agreed with Senator Taft that neither a hospital nor any other nonprofit organization, so long as it was not operating a commercial enterprise, was engaged in commerce within the meaning of the Act. He so stated repeatedly (93 Cong. 4997, reprinted 2 Leg. His. L.M.R.A. 1464):

> "Mr. President, I appreciate the reasons given why the committee did not act on it. I think we all realize that hospitals that are working on a nonprofit basis are not engaged in interstate commerce * * *
>
> * * *
>
> "It simply makes a hospital not an 'employer' in the commercial sense of the term. It is not a business operating on a profit basis."

Speaking in answer to a question about the right of nurses to organize, Senator Tydings stated (93 Cong. Rec. 4997, reprinted 2 Leg. His. L.M.R.A. 1465):

> "They should not have to come to the National Labor Relations Board, as in the case of ordinary business concerns. They are not in interstate commerce. * * * A charitable institution is away beyond the scope of labor-management relations in which a profit is involved."

Senator Tydings nevertheless insisted it would be helpful to have a specific exemption of nonprofit hospitals and the Senate adopted his amendment (93 Cong. Rec. 4997, reprinted 2 Leg. His. L.M.R.A. 1465).

The conference report again made it plain that Congress did not regard any nonprofit organization as subject to the Act so long as it confined itself to noncommercial endeavors. Thus House Conf. Rept. No. 510, 80th Cong., 1st Sess., on H.R. 3020, p. 32, reprinted 1 Leg. His. L.M.R.A. 536, stated:

> "The conference agreement follows the * * * Senate amendment in the matter of exclusion of nonprofit organizations and associations operating hospitals. The other nonprofit organizations excluded under the House bill are not specifically excluded in the conference agreement, for only in exceptional circumstances and in connection with purely commercial activities of such organizations have any of the activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act."

Since the enactment of the Labor Management Relations Act, the National Labor Relations Board has consistently dismissed all complaints against nonprofit organizations, unless they were engaged in a business venture. In doing so it has reviewed the legislative history above recited and stated (*The Trustees of Columbia University*, 1951, 97 N.L.R.B. 424, 427):

> "Whether or not this language provides a mandate, it certainly provides a guide."

In addition to the *Columbia University* case, the Board has similarly dismissed in *Lutheran Church, Missouri Synod,* 1955, 109 N.L.R.B. (radio station operated on a nonprofit and noncommercial basis); *Armour Research Foundation,* 1954, 107 N.L.R.B. 1052, 1053 (only 27% of the foundation's work was commercially sponsored); *Philadelphia Orchestra Association,* 1951, 97 N.L.R.B. 548, 549.

For some reason some members of the National Labor Relations Board have assumed that the House Conference Report had been referring to prior Board practice when it stated that "only in exceptional circumstances and in connection with purely commercial activities" had nonprofit organizations "been considered as affecting commerce." In this regard see the *Columbia University* case (97 N.L.R.B. at 427) where it is stated:

> "Regardless of whether or not the conference report literally recites the Board's practice prior to the amendment of the Act, it does indicate approval of and reliance upon the Board's asserting jurisdiction over nonprofit organizations 'only in exceptional circumstances and in connection with purely commercial activities of such organizations.'"

Actually, as indicated by the above quoted query as to whether the report "literally recites" the Board's prior practice, the Board had never prior to the enactment of the Labor Management Relations Act formulated any such a policy. We do not read the Conference Report as having any reference to any prior practice of the Board. Rather every indication from the language used in the report and from similar references throughout the legislative history of the

Labor Management Relations Act, is that Congress meant that neither Congress nor the courts had considered nonprofit noncommercial activities to affect commerce. The dichotomy between commercial and noncommercial activities of nonprofit organizations does not appear in prior Board decisions nor in any statements made to Congress by representatives of the Board. Instead it seems to have come before Congress by way of the *Massachusetts* and *Pennsylvania* cases, quoted above, which were called to the attention of Congress (see footnote 6, p. 44, *supra*).

Nothing in the legislative history suggests to us that Congress intended that the Board exercise a discretionary jurisdiction over the noncommercial activities of nonprofit organizations. On the contrary all the legislative history is consistent only with the proposition that Congress did not believe the Board had any jurisdiction in such instances because no commerce was involved. Every indication is that Congress would have written in such an amendment had it had the slightest notion that anyone would regard these activities as within the Board's jurisdiction. Congress was certain the amendment was useless and might prove harmful by creating the inference that some noncommercial activity not encompassed by the amendment remained subject to the Board's jurisdiction.

Accordingly it must be concluded that the Board has no discretionary jurisdiction over the noncommercial activities of nonprofit organizations. The Board has no power to proceed because of the absence of the requisite effect on commerce.

5. The amici curiae were properly regarded by Chairman Farmer and Board Member Peterson as nonprofit organizations not engaged in commercial ventures within the Congressional intent that the activities of such organizations should not be considered as affecting commerce within the meaning of the Act

The respondent labor organizations are all unincorporated associations organized for purposes other than the making of profit. Labor unions have uniformly been recognized by Congress as nonprofit organizations. The House Report No. 245 on H.R. 3020, 80th Cong., 1st Sess., p. 12, reprinted 1 Leg. His. L.M.R.A. 303, explained that its listing of organizations to be excluded as "not engaged in 'commerce' and certainly not interstate commerce," consisted of the "institutions that qualify as charities under our tax laws." Labor organizations are exempted from taxation by Section 501 (c)(5) of the Internal Revenue Code of 1954, which in subsection (3) exempts "any community chest, fund or foundation organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual" (26 U.S.C. 501). Similar exemptions of both labor organizations and substantially the same group of religious, charitable, scientific, literary and educational organizations have been present in our federal internal revenue codes at least since 1939. See Section 101 (1) and (6) of the 1939 Internal Revenue Code.

The respondent Building Association is organized as a nonprofit corporation (R. 86a-87a). Its only function is to hold title to a small office building used only by labor organizations or the health and welfare

plans (R. 87a). All of its stock is owned by six Teamster locals (R. 86a-R. 87a). Thus it too is a nonprofit organization not engaged in any commercial activity. Under federal tax laws the same exemption applicable to labor organizations and charities applies to a corporation organized for the exclusive purpose of holding title to property, collecting income therefrom and turning over the entire amount thereof, less expenses to an organization which itself is exempt. Section 501 (c)(2) of the Internal Revenue Code of 1954. Section 101 (14) of the Internal Revenue Code of 1939.

Similarly the Security Plan Office and Earhart, its administrator, are engaged solely in a nonprofit noncommercial activities. The same exemption from federal tax laws is applicable to both associations and trusts administering health and welfare plans in which the funds are contributed by employers and the benefits paid to employees. Section 501 (3) and (9) of the Internal Revenue Code of 1954; Section 101 (6) and (16) of the Internal Revenue Code of 1939.

Quite aside from federal tax laws all the *amici curiae* are generally considered in legal and lay parlance alike as nonprofit organizations not engaged in business enterprises. No plausible reason has been advanced for overturning the determination of then Chairman Farmer and then Board Member Peterson that all of the *amici curiae* are nonprofit organizations not engaged in any commercial enterprises and hence their activities do not affect commerce within the meaning of the Act. There was no evidence offered which in any way contradicted the finding made by these two Board members that the basic aim of all the

amici curiae was to improve the "working conditions of workers, increase their job security, and otherwise promote their general welfare" (R. 233a).

B.

The Determination of Board Member Murdock That a Labor Organization is an Employer Under Section 2 (2) of the National Labor Relations Act Only With Respect to Its Commercial, as Distinguished From Its Traditional Trade Union, Activities, Is Correct

The instant case was the first time the Board was called upon to decide a case in which an organization which came within the definition of "labor organization" in Section 2 (5) of the Act, would have been required to come within the definition of "employer" in Section 2 (2) of the Act, before the Board would have power to act.[8] Section 2 (2) of the Act, in respect here pertinent, provides:

> "The term 'employer' * * * shall not include * * * any labor organization (other than when acting as an employer) * * *."

Based upon the language of this section, the structure of the statute, and its legislative history, Board Member Murdock concluded that (R. 236a):

> "Congress did not intend, either in the Wagner Act or the Taft-Hartley Act, to regulate relations between unions and such employees as they

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[8] *Air Line Pilots Assn.*, 1951, 97 N.L.R.B. 929 did not present this issue. As the Board pointed out in footnote 2, page 929: "The Employer is not a 'labor organization' within the meaning of Section 2 (5) of the Act; its participants or members are not 'employees' within the meaning of Section 2 (3), because they are employed by airlines which are subject to the Railway Labor Act, and it exists for the purpose of dealing with persons which are not 'employers' within the meaning of Section 2 (2)."

utilize in their normal collective bargaining activities. When a union leaves its normal role as a collective bargaining agency, and embarks on a commercial enterprise, however, it obviously cannot carry into that field its immunity as a collective bargaining agency."

In his concurring opinion Board Member Murdock relied primarily upon three bases in support of his reading of Section 2 (2):

First, he quoted from the Senate Report on the bill which became the original National Labor Relations Act the explanation of the reference to labor organizations in Section 2 (2) in which the parenthetical phrase is characterized as applicable only to the "extreme" cases where unions act as employers (R. 237a). Board Member Murdock pointed out that the use of the word "extreme" must have reference to instances where "unions have departed from their traditional role and embarked on commercial enterprises * * * where they have employees in the same context as any other industrial employer" (R. 238a).

Second, Board Member Murdock relied upon "the admitted—and often-criticized—fact, that the Wagner Act was intended to regulate employers and unions in the interest of employees and unions—not to regulate unions as well" (R. 238a).

Third, Board Member Murdock relied upon the establishment of a full regulatory code for labor organizations in the Taft-Hartley Act, which proscribed their "causing or attempting to cause" discriminatory employment practices only as to other employers. In this regard Board Member Murdock stated (R. 238a):

"The Taft-Hartley Act, however, regulated unions as well as employers. But nowhere in its language or its legislative history is there the slighest indication that Congress intended to regulate unions in relation to their own ordinary employees under the 8 (a) sections of the Act. Congress specified the proscribed union unfair labor practices in Section 8 (b) of the Act, which are pertinent in relation to employees of other employers rather than in the context of their own ordinary employer-employee relations. Thus, for example, in Section 8 (b)(2), unions are prohibited from 'causing or attempting to cause' other employers to discriminate against their employees, but unions are not forbidden to discriminate against their own employees. The specification in Section 8 (b) of what are unfair labor practices by unions necessarily excludes others not mentioned, under well established principles of statutory construction."

Each of the three foregoing analyses of the statute and its legislative history is entirely accurate. Additional materials in the legislative history not adverted to by Board Member Murdock reinforce his analyses.

1. The legislative history of Section 2 (2) of the National Labor Relations Act establishes that the parenthetical expression, which has the effect of subjecting a labor organization to the jurisdiction of the Board when it is acting as an employer, was inserted solely for the purpose of reaching unions when they operate businesses or engage in similar commercial transactions

Labor organizations were excluded from the definition of "employer" in the first bill introduced by Senator Wagner in 1934. S. 2926, 73rd Cong., 2d Sess., Section 3 (2), reprinted Legislative History of the National Labor Relations Act, 1935 (Gov't Print. Off., 1949), vol. 1, p. 2. During the hearings on this

bill in 1934 this exclusion was criticized from two different points of view. In neither instance did the witnesses so much as hint that they were concerned with the rights of employees of labor organizations engaged solely in traditional trade union activities. First, and except in two instances, all of the criticism came from those who opposed a "one-sided" regulation of employers and desired a comprehensive code establishing union as well as employer unfair labor practices along the lines now embodied in the Taft-Hartley Act. The exclusion of labor unions from the definition of "employer" was admittedly a legislative device to assure that no charges of interference with full freedom not to organize or to join unions of their own choice would be levelled at unions based on their activities in picketing, striking or boycotting. The removal of this exclusion was therefore one aim of those who wanted to prohibit "coercion or intimidation from any source."[9] Their arguments show they were not even directing their remarks to the rights of employees of unions, whether engaged in commercial activities or not. For instance, Harold Edwards testifying in opposition to the bill as the representative of a group of employers expressed their view as follows (Hearings before the Senate Committee on Education and Labor, on S. 2926, 73rd Cong., 2d Sess., p. 951, reprinted 1 Leg. His. N.L.R.A. 1935, p. 989):

> "the exemption of 'any labor organization' as an employer is unfair * * *

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[9] The language quoted is from the amendment to Section 7 proposed by Senator Tydings which went to a vote on the floor of the Senate and was defeated during the formal debates preceding adoption of the original Wagner Act. 79 Cong. Rec. 7653-7675, reprinted 2 Leg. His. N.L.R.A. 1935, pp. 2357-2400.

"* * * penalties should be imposed on unfair labor practices from any source and not exclusively on employers."

Guy L. Harrington, representing the National Publishers Association, stated (Hearings, *op. cit.*, p. 460, reprinted 1 Leg. His. N.L.R.A. 1935, p. 494):

"Even the definition of employer in section 2 (a) excludes labor organizations, thus exempting them from possible punishment for unfair labor practices. While laying down specific rules of fair practice for employers, none are given for employees."

Charles R. Hook, president of American Rolling Mill Co., said (Hearings, *op. cit.*, pp. 752-753, reprinted 1 Leg. His. N.L.R.A. 1935, pp. 790-791):

"Section 3 (2) of the Wagner bill specifically excepts labor organizations and their officers or agents under the definition of an employer and thereby grants them immunity with respect to practices classed as unfair on the part of all other employers and violation of which submits the other employers to the liability of fine and imprisonment. By implication, it makes a gentleman of one and a criminal of the other.

"I submit to your judgment, would it be fair, if you were going to set up rules for a contest in any sport, that the rules of the game apply to only one side? How long would the sense of justice of the audience stand for permission to be granted to one side in a football game to use the flying wedge, the flying tackle, signals in the huddle, clipping, and slugging, and at the same time applying penalties to the other side for the same practice?"

When the remarks of L. L. Balleisen, secretary, Industrial Division, Brooklyn Chamber of Commerce, quoted in Brief for Petitioner, p. 12, n. 7, are read in context it will be seen he too was concerned solely with the "one-sided" character of the bill. Balleisen's reference to a labor organization hiring employees and hence being an employer had nothing to do with any organizational problems of those employees but merely pointed to an easy legalism available for use in subjecting labor organizations to the full sanctions of the Board for their unfair labor practices directed at employees of other employers. Hearings, *op. cit.*, pp. 651-654, reprinted 1 Leg. His. N.L.R.A. 1935, pp. 689-692.

Only two witnesses were concerned with the rights of employees of unions and in each instance the witness made it clear his concern was with employees hired by a union for the purpose of carrying on a business or industrial enterprise. Leslie Vickers, economist, American Transit Association, in sentences preceding and following those quoted in Brief for Petitioner, pp. 12-13, n. 7, shows he has in mind the business enterprises run by unions. Mr. Vickers stated (Hearings, *op. cit.*, p. 682, reprinted 1 Leg. His. N.L.R.A. 1935, p. 720):

> "The history of labor organizations becoming rich and powerful and entering into business is too recent to disregard in connection with this subject. * * * Under the exclusion as now contained in the bill it is entirely conceivable that labor organizations in themselves will displace industrial organizations, and if and when they do they will not be required under the language of this exclusion to comply with the provisions of this act."

We read the latter sentence of Mr. Vickers' statement quoted above as pointing to the competitive advantage the exclusion may give to labor organizations in their business enterprises. We can think of no other way that even the wildest economist could suggest that the exclusion might result in a displacement of other industrial enterprises by those run by unions.

The second witness concerned with the effect of the exclusion where unions embark on business enterprises was likewise an economist, Dr. Gus W. Dyer, professor of economics at Vanderbilt University. He stated (Hearings, *op. cit.*, p. 902, reprinted 1 Leg. His. N.L.R.A. 1935, p. 940):

> "Labor organizations may employ an unlimited number of workers to engage in all sorts of business activities. But they are not employers and those who work for them are not employees."

As economists the above two witnesses were in a position where they were more likely than most other persons to have a broad perspective of the extent to which unions had embarked on industrial ventures. During the decade preceding their testimony many American unions had operated substantial business enterprises.[10] And a few unions had even been accused of playing the role of anti-union employers with respect to their own industrial employees. The best known instance is that of the *Coal River*

[10] Selig Perlman and Philip Taft, History of Labor in the United States, 1896-1932 (MacMillan, 1935), pp. 572-579 chapter entitled "Labor In Imitation of Business"; Herbert Harris, American Labor (Yale Uni., 1939), pp. 250, 336-338; Florence Peterson, American Labor Unions (1945), pp. 35-37, 177; Harry A. Millis and Royal E. Montgomery, Organized Labor (1945), pp. 344-352.

Collieries case where the Brotherhood of Locomotive Engineers purchased as an investment in the early 1920's a mining property in the heart of the then non-union West Virginia mining region. As a result of the difficulty in paying union wages in the mines and competing with non-union mines the Brotherhood got into a public dispute with John L. Lewis and the United Mine Workers.[11]

At the close of the hearings in 1934, the Senate Committee on Education and Labor reported S. 2926 with the definition of employer amended so as to exclude "any labor organization (other than when acting as an employer)". Section 2 (2) of S. 2926, 73rd Cong., 2d Sess., as reported, reprinted 1 Leg. His. N.L.R.A. 1935, p. 1085. The accompanying committee report justified the exclusion of labor organization from the definition of employer on the ground that legalistically every labor organization is in "one sense" an employer because it "hires clerks, secretaries, and the like" and unless excluded might be barred as such from inducing employees to join. The report explains that this exclusion because of the "one sense" in which every union is an employer in no wise necessitates the exclusion of a union when in the other sense it is an employer, and hence the bill includes labor organizations in the other sense. The inference is unescapable that employer sense in which unions are included "when acting as an employer" is not as the employer of "clerks, secretaries, and the like" but as the employer of employees in an industrial or business enterprise. S. Rep. No. 1184 on S. 2926,

[11] Locomotive Engineers' Journal, August 1923, p. 625; Seligman and Taft, *op. cit.*, p. 578; Harris, *op. cit.*, p. 250.

73rd Cong., 2d Sess., p. 4, reprinted 1 Leg. His. N.L.R.A. 1935, p. 1102.

In 1935, the bill which became the National Labor Relations Act, as introduced by Senator Wagner, defined employer to exclude all labor organizations unqualifiedly. Section 2 (2) of S. 1958, 74th Cong., 1st Sess., reprinted 1 Leg. His. N.L.R.A. 1935, p. 1296. The omission of the qualifying parenthesis, which would have included unions when acting as employers, was justified on the basis of the ambiguity of the qualification and the rarity of the situation for which the qualification was designed. Thus the Senate Committee Comparison of S. 1958, 74th Cong., 1st Sess. with S. 2926, 73rd Cong., 2nd Sess., as reported, p. 19, reprinted 1 Leg. His. N.L.R.A., 1935, p. 1342, states:

> "The parenthesis in the committee draft is omitted as unduly confusing and as making the entire reference to labor organizations in the subsection very ambiguous and difficult of construction. The *extreme* case against which the parentheses [sic] was intended to guard does not seem to justify endangering the entire purpose of the provision, that a labor organization or anyone acting in the capacity of officer or agent of such organization shall not be deemed an employer and subject to the act because of activities which it is the very purpose of labor organizations or their officers to engage in." (Emphasis supplied).

The use of the word "extreme" which Board Member Murdock considered so revealing of Congressional intent (R. 237a-238a), in the above committee comparison of the two bills, must have had reference to the instances of unions going into business urged by the two economists, Mr. Leslie Vickers and Dr. Gus W. Dyer, as described heretofore (pp. 60-61,

supra). The parenthetical "(except when acting as an employer)" had been inserted solely to meet their criticism and was now being omitted because of the infrequency of instances of unions going into business.

Nowhere in the hearings in 1935 does there appear to have been any reference to the rights of employees of unions. Neither employees engaged in business enterprises run by unions nor employees engaged in traditional trade union activities seem to have been in the thinking of any witness. Those who opposed the bill as "one-sided" because it did not reach "coercion and intimidation from any source" again listed the exemption of labor organizations from the definition of employer as a defect in the bill. Robert G. Graham, vice president of Graham-Paige Motors Corp., whose testimony the Brief of the Petitioner (p. 14, n. 12) purports to quote, falls in this group. The petitioner quotes Mr. Graham as criticising the effect of Section 2 (2) to exclude labor organizations from the "requirements" to which employers are subject. The word he used was "inquisitions." The sentence itself follows a criticism of the broad powers the bill would confer on the Board to have access to and the right to copy any evidence of persons being investigated or proceeded against. Hearings before Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess., p. 604, reprinted 2 Leg. His. N.L.R.A. 1935, p. 1990. Mr. Graham expressly stated that the exemption of labor organizations from the definition of employer showed the "one-sided character of this legislation" and called for amendments which would police labor equally with industry. In this vein he stated (Hearings, *op. cit.*, pp. 609-610, reprinted, 2 Leg. His. N.L.R.A. 1935, pp. 1995-1996):

"Labor organizations should be required to adopt and use sound accounting methods, subject to examination by appropriate public authority as to all funds received and disbursed. Certainly no organization should be given the rights accorded by this bill without being held strictly accountable and responsible for the exercise and results of such rights and without being subject to the jurisdiction and to the orders of our courts.

"The one-sided character of this legislation is indicated by the restraints placed upon employers as against the lack of any restraints whatsoever upon labor organizations. The theory, of course, is that employers are supposed to be protected by the common law.

"What protection does the common law offer to the employer against such coercive tactics as the flying motorcade used in the textile strike?

"It is only fair when a law restricts one party that it should also restrict the other parties involved."

The parenthetical expression "(other than when acting as an employer)" again appeared in the bill in 1935 as reported by the committee. Section 2 (2) of S. 1958, 74th Cong., 1st Sess., as reported, reprinted 2 Leg. His. N.L.R.A. 1935, p. 2286. The committee report contained the paragraph quoted by Board Member Murdock in his concurring opinion. This paragraph reads as follows (S. Rept. No. 573, on S. 1958, 74th Cong., 1st Sess., p. 6, reprinted 2 Leg. His. N.L.R.A., 1935, p. 2305):—

"The term 'employer' excludes labor organizations, their officers and agents (except in the *extreme* case when they are acting as employers in relation to their own employees). Otherwise

> the provisions of the bill which prevent employers from participating in the organizational activities of workers would extend to labor unions as well, and thus would deprive unions of one of their normal functions." (Emphasis supplied.)

Board Member Murdock read the word "extreme" as expressing the Congressional intent that only unions engaged in business ventures should be subject, as employers, to the Act. Board Member Murdock stated (R. 237a-238a):

> "There is nothing 'extreme' or unusual in a union having employees in carrying on its normal collective bargaining functions. At the minimum unions commonly have office and clerical employees and paid organizers, as Congress plainly knew. Therefore Congress must have been talking about something else when it made reference to 'extreme cases' where they are acting as employers in relation to their own employees. Such 'extreme cases' do exist where unions have departed from their traditional role and embarked on commercial enterprises—banks for example—where they have employees in the same context as any other industrial employer. Plainly then, this exceptional and limited area must be what Congress had in mind. As such, it is the sole exception in which unions are included in the definition of 'employer' and are subject to 8 (a) sections of the Act." (Footnote omitted.)

The legislative history of this provision as set forth above can leave no doubt that the parenthetical expression "(other than when acting as an employer)" was inserted solely for the purpose of reaching those unions who engaged in industrial or business enterprises.

2. Consideration of the adverse effects upon unions which would result from any attempt to apply the provisions of the Taft-Hartley Act which protect the right to be opposed to unions equally with the right to support unions, to the staffing of labor organizations establishes that Congress intended to apply the Act only to the commercial activities of unions

If, in view of the foregoing legislative history, any ambiguity with respect to the intent of Congress remains, this Court in resolving the ambiguity may properly consider the problems which would be created by any attempt to apply the provisions of the Labor Management Relations Act to unions engaged solely in traditional trade union activities. The occasions upon which this Court resorts to such a method of legislative construction and the standards it applies in doing so were stated in *Vermilya-Brown Co.* v. *Connell*, 1948, 335 U.S. 377, 387-388, as follows:

> "While the general purpose of the Congress in the enactment of the Fair Labor Standards Act is clear, no such definite indication of the purpose to include or exclude leased areas, such as the Bermuda base, in the word 'possession' appears. We cannot even say, 'We see what you are driving at, but you have not said it, and therefore we shall go on as before.' Under such circumstances, our duty as a Court is to construe the word 'possession' as our judgment instructs us the lawmakers, within constitutional limits, would have done had they acted at the time of the legislation with the present situation in mind." (Footnotes omitted.)

The Board did not consider the merits of the charges of unfair labor practices levelled at the *amici curiae*. The Board ordered and heard oral argument only on with respect to the applicability of the Act

(R. 219a). An official transcript of that argument was taken by the Board. The colloquies between Board members and counsel reflect many of the respects in which it would be utterly incongruous to attempt to apply the unfair labor practice provisions of Section 8 (a) to relations between a labor union and members of its staff engaged solely in traditional trade union activities. Others of these incongruities appear in the Trial Examiner's Intermediate Report. Still others are reflected by the record and the pleadings.

The most usual situation is for employees of labor organizations to be members of that organization. Indeed, Board Member Murdock expressed amazement that counsel for the petitioner should claim that organizers and negotiators for a union had both the right to be members of any union they chose or opposed to unionism and also the right to act for their employer in conducting collective bargaining negotiations. (Transcript of Oral Argument, pp. 48-51). His views in this regard appear in part in the following colloquy between Board Members and Mr. Finley, counsel for the petitioner (Transcript of Oral Argument, pp. 48-49):

> "Mr. Murdock: In line with the question that I propounded to one of the other lawyers, I would assume that your union, the one you represent, would not have any employees engaged in collective bargaining who were not members of your union, would you?
>
> "Mr. Finley: Are you referring to the International or the local?
>
> "Mr. Murdock: To the representative. If your International or a local, representing a certain

group of employees for collective bargaining, you would not have anyone engaged in that particular activity who was not a member of the union, would you?

"Chairman Farmer: An organizer, for example, or an International representative who does the bargaining for the union. You are a union office worker.

"Mr. Finley: Yes.

"Chairman Farmer: And you grant his statutory right to be a member of yours or a different labor organization.

"Mr. Murdock: That is all.

"Mr. Finley: That is the question?

"Mr. Murdock: Well, what I am getting at is this: * * * it would seem to me absolutely incompatible with the duty of collective bargaining to have anyone sitting in thein bargaining meetings of the Teamsters' Union who is not actually a member of the Teamsters' Union. That brings us around * * * to the question of whether Congress could possibly have had that type of employment in mind when it referred to the employment of labor union of its own employees.

"Then, doesn't that bring us around to this aspect of the situation: that what Congress must have had in mind is employees of a labor union who are not engaged in any way in that collective bargaining function, because of the incompatibility that would exist if you had other unions organizing, let's say, the very people who were doing the collective bargaining for the union?"

Board Member Murdock likewise raised the issue of whether the same considerations were applicable to the office clerical employees whose tasks concerned

only traditional trade union functions. His view that they were was stated as follows (*Ibid.*, p. 51):

> "Mr. Murdock: Let's assume that the duties of clerks and stenographers and so on are limited exclusively to the union activities, as distinguished from any commercial activities. Certainly those clerks and stenographers, if they were not members of that particular union, were not particularly interested in the welfare of that union's activities in the representation of employees, and could cause a lot of trouble, I would think, in all functions of collective bargaining."

With respect to the representatives of management who conduct collective bargaining, make and enforce no solicitation rules, make speeches to and conduct interviews with, employees about labor organization, and those who serve as secretaries, stenographers, clerks and switchboard operators for these representatives of management, Congress has made plain its view that the loyalty to management essential to their job is inconsistent with application of the Act to them. The reasons which motivated Congress in excluding supervisors from the definition of employee in the Act and for rejecting as unnecessary exclusions of confidential employees because the Board already excluded all clerical employees having access to confidential employer labor policy, are equally applicable to the staffs of labor unions. The statements appearing in the legislative history of the Labor Management Relations Act show Congress believed it was only according to management the same right as unions already had to apply discriminatory standards in selecting and retaining organizers, negotiators and clerical staff to collect dues, draft contracts and take dictation from union officers.

House Report No. 245, 80th Cong., 1st Sess., on H.R. 3020, pp. 16-17, reprinted 1 Leg. His. L.M.R.A. 307-308, explains the exclusion of supervisors as follows:

> "*Management, like labor, must have faithful agents.*— * * *
>
> "What the bill does is to say what the law always has said until the Labor Board in the exercise of what it modestly calls it 'expertness,' changed the law: that no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust." (Emphasis in original).

The above quoted House Report, in listing the various aspects of labor relations in which undivided loyalty from employees is essential, mentions the counterpart on the employer's side of almost every job performed for the union by the employees here involved. Thus the report states (*id*):

> "just as there are people on labor's side to say what workers want and have a right to expect, there must be in management and loyal to it persons * * * to settle their complaints and grievances * * * and to carry on the whole of labor relations.
>
> "Labor relations people negotiate labor agreements and handle disputes not settled in the shops. * * * Doctors, nurses, safety engineers and adjusters handle claims for disability benefits * * *.
>
> "Other employees handle intimate details of the business that frequently are highly confidential. Some affect the employer's relations with labor."

The repeated references in this legislative history to the need of management for representatives to serve them with "undivided loyalty"[12] are equally applicable to the needs of unions. To require a union to retain in its employ as an organizer, negotiator, collector of dues, or receptionist one who is anti-union or pro-rival union can inflict untold harm on the union. These are all jobs which can only be performed satisfactorily by enthusiasts for the union. The same hostility which would cripple a management representative who was charged with the duty of making an anti-union speech to employees when he really believed in the union would equally cripple a union representative who was sent out to organize or collect dues for the union when he was opposed to unions in general or that particular union.

The propriety of subjecting to the regulatory features of the Act the relationships between management and its clerical staff having access to confidential labor policy was fully considered by Congress at the time it enacted the Labor Management Relations Act. The House had favored an express exemption. Its position was set forth in H. Rept. No. 245, 80th Cong., 1st Sess., on H.R. 3020, p. 23, reprinted 1 Leg. His. L.M.R.A. 314:

> "The Board, itself, normally excludes from bargaining units confidential clerks and secretaries to such people as these. But protecting confidential * * * information * * * ought not to rest in the administrative discretion of the Board. * * *"

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[12] S. Rept. No. 105, 80th Cong., 1st Sess., on S. 1126, p. 5, reprinted 1 Leg. His. L.M.R.A. 411; 93 Cong. Rec. 3443, 3836, 4283, 5014 reprinted 1 Leg. His. L.M.R.A. 647, 2 Leg. Hist. L.M.R.A. 1008-1009, 1148, 1496.

The Senate, however, felt an exclusion was unnecessary because the Board's interpretation of the Act was satisfactory. The House acquiesced in this position. House Conference Report No. 510, 80th Cong., 1st Sess., on H.R. 3020, p. 35, reprinted 1 Leg. His. L.M.R.A. 539 states:

> "The conference agreement, in the definition of 'supervisor,' limits such term to those individuals treated as supervisors under the Senate amendment. In the case of persons working in the labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as outside the scope of the Act. This is the prevailing Board practice with respect to such people as confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect."

Senator Taft on the floor of the Senate gave almost an identical explanation of the intent of the conference committee in accepting the Senate version of the bill. 93 Cong. Rec. 6442, reprinted 2 Leg. His. L.M.R.A. 1537.

Organized labor has never claimed that those representatives of management who made labor policy should be union members. This Court recited facts in its opinion in *Packard Motor Car Co.* v. *N.L.R.B.*, 1947, 330 U.S. 485, 487, showing that the foremen there involved did not act as management representatives in formulating labor policy and that even their role in executing it was largely ministerial. Nor has organized labor claimed that confidential secretaries of management representatives should become union members. While unions have often differed with

the Board as to whether the duties of given clerical employees involved access to confidential labor policy, the frequent instances in which they have agreed with employers on exclusion from units of those who did have access attests to their recognition that these jobs too require "undivided loyalty."[13]

The Board's present policy makes the exclusion as "confidential" turn upon the character of the work of the person whom the employee assists or for whom the employee acts in a "confidential" capacity, rather than the nature of the work performed by the "confidential" employee. The test is whether the persons assisted by the "confidential" employee "formulate, determine and effectuate management policies in the field of labor relations."[14] All of the persons assisted by the office clerical employees here involved formulated, determined and executed labor organization policies in the field of labor relations. As officers of labor organizations they were the counterparts on labor's side of the persons who formulate, determine and effectuate management policies in the

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[13] In the following cases the union agreed to the exclusion of employees described: *B. F. Goodrich Co.*, 1950, 92 NLRB 575, 576 ("senior stenographer" who "maintains confidential files of the personnel manager"); *E. P. Dutton & Co., Inc.*, 1941, 33 NLRB 761, 767, n. 8 ("private secretaries"); *Brooklyn Daily Eagle*, 1939, 13 NLRB 974, 985, n. 5 (secretary to publisher and secretary to secretary treasurer); *General Telephone Co. of Ohio*, 1955, 112 NLRB 1225, 1228 ("parties have agreed to exclude * * * all payroll clerks in the personnel department and personnel clerks therein, as well as the treasury cash clerk, as confidential employees"); *Curtiss-Wright Corp.*, 1953, 103 NLRB 458, 459-460 (secretary to quality control and metallurgical engineering manager); *B. F. Goodrich Co.*, 1956, 115 NLRB 722, 725, n. 8 (personal secretary to personnel manager).

[14] *B. F. Goodrich*, 1956, 115 NLRB 722, 724.

field of labor relations. The officers of the Teamsters International, the Joint Council and the various locals did collective bargaining for employees. The office clerical employees here involved assisted them. Their duties were the same kind as have been performed by those whom the Board has classified as confidential. Persons excluded by the Board as confidential employees have been described as performing such duties for corporate or personnel officers as taking dictation, receiving incoming phone calls, typing reports, serving as cashier or accounting machine operator, or being present at staff meetings.[15]

These are just the kind of duties which clerical office employees regularly perform for labor unions and which the staff here involved was engaged in performing.

Quite apart from the divided loyalty which would certainly exist if employees of labor unions have the right by law to be anti-union or pro-rival union, the application of the Act to such employees would create such difficult problems as whether a union committed unfair labor practices by accepting its own employees

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[15] *Minneapolis-Honeywell Regulator Co.*, 1954, 107 NLRB 1191; *Creamery Package Mfg. Co.*, 1941, 34 NLRB 108, 110; *General Telephone Co. of Ohio*, 1955, 112 NLRB 1225, 1228; *Potomac Electric Power Co.*, 1955, 111 NLRB 553, 562; *Koehring Southern Co.*, 1954, 108 NLRB 1131, 1133; *Ohio Ferro Alloys Corp.*, 1953, 107 NLRB 504, 505; *Bond Stores, Inc.*, 1952, 99 NLRB 1029, 1031, n. 4. While in *B. F. Goodrich*, 1956, 115 NLRB 722, 724, n. 7, the *Minneapolis-Honeywell* and *Bond* cases are overruled to the extent that they classified as confidential employees who merely assisted "persons involved in handling grievances" or other persons not engaged in formulating, determining and effectuating labor policy, there is no suggestion in the *Goodrich* case that the character of the tasks which the alleged confidential employee performs for the formulator or executor of labor policy is material.

as members. Here charges of domination of itself in violation of Section 8 (a)(2) of the Act were brought against Teamster Local 223 (R. 36a). The respondent International Teamsters Union was likewise charged with dominating its own local (R. 35a). The Trial Examiner found that "Local 223 has in its capacity as an employer contributed unlawful support to itself in its capacity as a labor organization" (R. 180a) but found it "unnecessary to pass on whether by the foregoing conduct Local 223 has dominated itself, assuming that to be possible" (R. 180a). The Trial Examiner likewise sustained charges that the International had contributed support to its own local in violation of Section 8 (a)(1) and (2) of the Act (R. 181a).

In this connection, at the oral argument before the Board, Board Member Peterson inquired of Mr. Finley, counsel for the petitioner, Local No. 11, of the Office Employees International Union as follows (Transcript of Oral Argument, p. 45):

> "Mr. Peterson: Who represents the employees of your International Union, or any of its officers [locals]?
>
> "Mr. Finley: * * * We have a local union here in Washington, and I have the impression—now, I am not certain about this at all—that they are represented by Local 2, of the Office Employees.
>
> "We might get into some rather detailed, complicated father-son, parent-child, relationships there * * *"

That Congress could have intended the Act to be applied to bar a union from supporting itself or one of its locals seems inconceivable.

The issues raised by the role of the petitioner as a competitor of the Teamsters in organizing office employees of industrial employees in the Portland area (Tr. 300-304, 388-389) and at the same time organizing office employees of the Teamsters unions were likewise the subject of attention at the oral argument. The repeated references therein to the case of *Bausch & Lomb Optical Co.*, 1954, 108 N.L.R.B. 1555, 1558-1560, require acquaintance with that case before the colloquies can be read intelligently. In that case the Board held that an employer was not required by the Act to bargain collectively with a union which engaged in a rival optical business. The Board's rationale as there stated was as follows (108 N.L.R.B. at 1559):

> "it is necessary to view the Act's collective-bargaining requirements in the light of the dual capacity which the Union now occupies. Collective bargaining is a two-sided proposition * * * the union must be there with the single-minded purpose of protecting and advancing the interests of the employees * * * In our opinion, the Union's position at the bargaining table as a representative of the Respondent's employees while at the same time enjoying the status of a business competitor renders almost impossible of operation the collective-bargaining process. * * * In our opinion, the situation created by the Union's dual status is fraught with potential dangers."

The relevance of the *Bausch & Lomb* case was suggested by counsel for the Teamsters Local 226, Mr. Landye, in answer to a question from Chairman Farmer as to whether there was "any incompatibility in one labor organization representing or attempting to organize employees of another labor organization" (Transcript of Oral Argument, p. 31). Thereafter

Board Member Peterson engaged in the following colloquy with Mr. Finley, counsel for the petitioner, Local 11 of the Office Employees International Union (*Ibid.*, pp. 45-47):

"Mr. Peterson: I am not trying to be facetious, but as I understand it, Local 11, involved in this case, and Local 223 of the Teamsters are in the Portland area, or were engaged competitively in organizing an office, am I correct?

"Mr. Finley: Apparently that was the case here.

* * *

"Mr. Peterson: What, if any, problems do you see of the Bausch & Lomb variety, in that situation?

* * *

"Mr. Peterson: Assuming Local 223 and Local 11 are engaged in, competitively engaged in organizing office employees in the Portland area, does it seem to be anomalous to have the office employees of Local 11 stay represented by Local 223, and the office employees of Local 223 located by Local 11, when the two organizations are in general competition for the representation of the employees of the other employers?

"Mr. Finley: That certainly would be a mixture that many of us wouldn't like to untangle and I do say in all seriousness, however, that this becomes a sort of a jurisdictional problem. The Office Employees International Union, defines its jurisdiction and the Brotherhood of Teamsters defines its jurisdiction.

"Most of you are aware again of some jurisdictional disputes that have been going on and I can say, in all fairness, that the Teamsters are trying to broaden the jurisdiction a little bit. You get into jurisdictional questions here and I did want to avoid that. I do not think it is something that really should get mixed up in this case.

"Chairman Farmer: No. We are concerned about your saying you wanted to discuss the question of whether it effectuated the policies of the Act. Now it is relevant, isn't it, if you get into the problem you are reluctant to discuss, or attempting to solve, doesn't that cast some doubt on whether it is good policy to go along with this proposition that you are advancing?

"Mr. Finley: No. I think the policy should be that we have to go ahead with observing the law, and I think a better policy would be as the Board has done in many other instances—let the labor organizations themselves draw their own lines and work this thing out. I think we are working that out. The coming merger of the A F of L and CIO is certainly a factor in consideration, and there are going to be mergers of the others.

"Chairman Farmer: I don't see the relevance of a merger in this type of case."

The many incongruities which would arise if the Act were applicable to the situation here presented must compel the conclusion that Congress could not have intended to apply the Act to employees of unions so long as they are functioning only in a traditional trade union role.

3. Serious Constitutional problems under the First Amendment would be presented by any construction of the National Labor Relations Act which would require a labor organization not to discriminate, because of union membership or activity or the lack thereof, in its employment relationship with persons paid by it to engage solely in traditional trade union activities

"The obligation rests also upon this Court in construing congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality." *United States* v. *C.I.O.*, 1948, 335 U.S.

106, 120-121; *United States* v. *Delaware & Hudson Co.*, 1909, 213 U.S. 366, 407-408; *American Communications Ass'n* v. *Douds*, 1950, 339 U.S. 382, 407.

The First Amendment to the Constitution of the United States, in its protection of the right to freedom of speech, assembly and petition, from Congressional infringement, encompasses the right of citizens to form labor organizations and conduct traditional trade union activities. *Thomas* v. *Collins*, 1944, 323 U.S. 516, 531-532; *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 1937, 301 U.S. 1, 33-34; *American Communications Ass'n* v. *Douds*, 1950, 339 U.S. 382, 389-390, 398, 406-407; *Inland Steel Co.* v. *N.L.R.B.*, 7 Cir., 1948, 170 F. 2d 247, 258, certiorari denied, 336 U.S. 960; *Local 309, United Furniture Workers of America, C.I.O.* v. *Gates*, D.C. N.D. Ind., 1948, 75 F. Supp. 620, 624. Thus, the First Amendment protects unions in their right to "have officers with such affiliations and political purposes as they might choose." *Kedroff* v. *St. Nicholas Cathedral*, 1952, 344 U.S. 94, 119, stating the ruling in *American Communications Ass'n* v. *Douds*, 1950, 339 U.S. 382.[16] But officers in the present day world

[16] In the *Kedroff* case this Court held that a state violated the Fourteenth Amendment (as it adopts and makes applicable to the States the guaranties of the First Amendment) when the state substituted its judgment as to who should be an officer of the church for that of the established tribunals of the church. The *Douds* case had been relied upon by the Court of Appeals of New York in rejecting the claim of constitutional infringement. This Court did not base its reversal in the *Kedroff* case on any distinction between trade unions and religious associations. Rather it assumed that they had identical constitutional rights with respect to freedom in selecting officers. It distinguished the *Douds* case on the ground that under the Taft-Hartley Act (344 U.S. at 119): "Unions could have officers with such affiliations and political purposes as they might choose but the Government was not compelled to allow

cannot function without hired organizers, negotiators and confidential clerical staffs. Cf. *In re Porterfield*, 1946, 28 Cal. 2d 91, 168 P. 2d 706, 719. To require officers of a union to dictate letters to, conduct conferences and meetings in the presence of, and collect dues through employees whose loyalties to the union were suspect, would interfere with their freedom to conduct trade union activities as much as the presence of police officers at union meetings did in *Local 309, United Furniture Workers of America, C.I.O.* v. *Gates*, D.C. N.D. Ind. 1948, 75 F. Supp. 620. In enjoining police officers from attending meetings held by a union in a public court house the court said (75 F. Supp. at 624):

> "It is clearly established by the evidence that the presence of the state police officers has prevented the union members from discussing freely the matters they wish to take up. It is true that the police officers have not actively prevented the plaintiffs from conducting their meetings as they desire or from speaking if they wished. But the evidence is that their presence and their taking of notes have had the same effect as if there were active interference. It is indicated that this has come about because of the belief that the state police have taken a role as partisans in the labor dispute between the Union and the Smith Manufacturing Company. This feeling of restraint, frustration, and interference within the minds of Union members, engendered by the presence of the state police, appears to be a natural result flowing from the conduct of the police officers in their relations with the striking employees and

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those officers an opportunity to disrupt commerce for their own political ends. We looked upon the affidavit requirement as an assurance that disruptive forces would not utilize a government agency to accomplish their purposes."

the employer. The evidence discloses that this feeling is neither imaginary nor inconsequential.

"* * * The freedom and liberty to express ourselves privately and to hold private assemblies for lawful purposes and in a lawful manner without government interference or hindrance is protected as much by the First Amendment as the right to do so publicly."

As is apparent from the statement of facts (*supra*, pp. 12, 14-16), the record here discloses that distrust by officers of the unions of clerical employees who joined a rival union led them to have private telephone lines installed and to leave their own offices to make calls over private lines. Several officers believed their mail was being withheld by a disloyal secretary. A union cannot be expected to believe a cashier at a dues collection window who was herself an ardent member of the Office Employees Union would inspire ready payment of dues to the Teamsters from employees at other plants where the Office Employees and the Teamsters were conducting rival organizational campaigns. The very face of an ardent Office Employee member at the Teamsters cashier window would be a deterrent to joining or continuing membership in the Teamsters to all employees of other employers whom the Office Employees was trying to organize.

All these serious constitutional problems are avoided if Section 2 (2) of the National Labor Relations Act is construed as including labor organizations within the definition of employer only when they conduct business or industrial enterprises.

C.

Neither the Oregon Teamster's Security Plan Office nor Earhart, its administrator, is either an employer or a labor organization within the meaning of the National Labor Relations Act, as amended, but to the extent that either receives funds from an employer in an industry affecting commerce, each is a statutory "neutral" within the meaning of Section 302 (c)(5) of the Labor Management Relations Act and as such is not subject to the jurisdiction of the National Labor Relations Board

Health and welfare plans maintained by contributions of employers engaged in an industry affecting commerce, are illegal under the Labor Management Relations Act unless they are administered by bipartisan trustees, together with such "neutral" persons as they may select to assist them. Section 302 (c)(5)(B) (29 U.S.C. 186 (c)(5) (B)) establishes the requirement of neutrality. Subsection (c) exempts from the criminal sanctions imposed upon payments to, or receipts of payments by, a representative of employees, instances where the payment is to a trust fund established for the purpose of paying benefits to employees as described in subparagraph (5) thereof. Proviso (B) to subparagraph (5) specifies one of the essential features of such a trust fund. The language of Proviso (B) insofar as here pertinent is:

> "the detailed basis on which such payments [to employees] are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such *neutral* persons as the representatives of the employers and the representatives of the employees may agree upon * * *." (Emphasis supplied.)

If the requisite commerce facts exist to bring the Security Plan Office or Earhart within any provision

of the Labor Management Relations Act, they are subject to regulation solely under Section 302 and not by the National Labor Relations Board. The "Trust Agreement Oregon Teamsters Construction Industry Welfare Plan" appears in the record (G. C. Exh. No. 2, Tr. 105). The testimony established that its terms were substantially identical with those of the other 17 trust agreements governing the Security Plan Office and Earhart (Tr. 107-108). These terms show they were carefully drafted to meet the requirements of Section 302. Both counsel for the Security Plan Office and Earhart stated during the hearing that the trusts conformed with the Taft-Hartley Act (Tr. 46, 56).

The trust agreement shows that three trustees are designated by Teamsters Joint Council No. 37 and three by the Portland Chapter of the Associated General Contractors of America (G.C. Exh. No. 2, Tr. 105). Its only provisions which are relevant to the status of the Security Plan Office and Earhart, its administrator, appear in Article VI, entitled "Administration of Trust Fund." The pertinent portions of this article are as follows:

> "(a) The administration of the Trust Fund shall be vested wholly in Trustees, and for such administration, the Trustees shall have the power, and it shall be their duty to
>
> "1. Establish an office in Portland, Oregon.
>
> * * *
>
> "4. Employ such clerical staff, and acquire such equipment, as may be necessary to properly carry out the administration of this Trust.
>
> * * *
>
> "8. Appoint an Administrator."

Earhart testified that the name "Oregon Teamsters' Security Plan Office" does not appear in any of the trust agreements but appears on the door of his office (Tr. 68). With respect to the work performed by Earhart and his staff, the undisputed evidence showed that they processed employee claims against welfare funds, receiving the claim, verifying physicians' reports, determined eligibility of the employee and coverage of the claim, allowed or disallowed the claim, and if allowed, drew a check in the appropriate amount and delivered it to the employee claimant (Tr. 121-123, 362).

The duties of Earhart and his staff in assisting the trustees in administering the trusts, as well as the highly discretionary powers which Earhart and his staff exercise in allowing or disallowing employee claims against the welfare fund, bring both Earhart and his staff into that category of persons who must be "neutral" if the requirements of Section 302 (c)(5) (B) are to be met.

We express no opinion as to whether the term "neutral" would preclude a member of Earhart's clerical staff from joining a union. We do think that it is evident the concept of neutrality which Congress had in mind is inconsistent with the notion that the Security Plan Office or Earhart should be subject to the jurisdiction of the National Labor Relations Board. The dual administration of the concept of "neutral" by the criminal courts as provided in Section 302 must necessarily exclude regulation of the same relationships by the National Labor Relations Board under the provisions of the National Labor Relations Act.

II.

IF ANY OF THE AMICI CURIAE WAS SUBJECT TO THE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD, THAT BOARD DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT, IN THE CIRCUMSTANCES PRESENTED BY THE RECORD IN THIS CASE, IT WOULD NOT EFFECTUATE THE POLICIES OF THE ACT TO ASSERT JURISDICTION

The then Chairman Farmer and then Board Member Peterson in addition to making the jurisdictional finding that the requisite effect on commerce within the meaning of the Act had not been established (R. 234a), also determined "that it will not effectuate the policies of the Act to assert jurisdiction in this proceeding" (R. 230a).[18] The court below addressed itself solely to the issue of whether, assuming the Board had jurisdiction, its determination not to exercise it was an abuse of discretion (R. 262-264). The majority of

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[18] The language "effectuate the policies of this Act" does not appear in the statute in a jurisdictional context but is used only to define the type of affirmative action which the Board may require of any person whom the Board has found guilty of unfair labor practices. Section 10 (c) of the National Labor Relations Act (29 U.S.C. 160 (c)). The only jurisdictional criteria in the Act is the absolute requirement that the unfair labor practices affect commerce within the meaning of the Act. Section 10 (a) of the Act (29 U.S.C. 160 (a)). The Board uniformly enters the finding that it "will not effectuate the policies of this Act to assert jurisdiction" when it believes that an appropriate exercise of its discretion would require it not to assert jurisdiction, whether or not it has the power to do so. See for example the use of this form of finding in the leading cases in which the Board established its standards of "discretionary jurisdiction". *Jonesboro Grain Drying Corp.*, 1954, 110 NLRB 481, 484; *Breeding Transfer Co.*, 1954, 110 NLRB 493; *Hogue and Knott Supermarkets*, 1954, 110 NLRB 543, 545; *McKinney Avenue Realty Co.*, 1954, 110 NLRB 547, 549; *Tanner Motor Tours, Ltd.*, 1955, 112 NLRB 275, 277; *Radio & Television Broadcast Engineers Union*, 1955, 114 NLRB 1354, 1364-1365. In none of these cases did the Board also, as here, make the jurisdictional finding that no effect on commerce within the meaning of the Act had been established (R. 234a).

the court held that there had been no abuse of discretion (R. 264). The court accordingly entered its decree affirming the Board's order of dismissal (R. 265-266).

All of the arguments which we have heretofore advanced to establish that the Board did not have jurisdiction over any of the *amici curiae* are equally relevant to a consideration of whether the Board abused its discretion in declining to act. If these arguments do not establish that the Board lacked jurisdiction, they certainly show, at the very least, that rational reasons existed for not asserting jurisdiction. We offer no criticism of the court below because it affirmed solely on the approval of the Board's exercise of discretion. Nor do we urge that this Court need decide that the Board had no power to act, should this Court agree that even had the Board the power, it properly declined to exercise it. An affirmance of the judgment below on either basis would seem equally appropriate.

A.

The Discretionary Power of the Board to Refuse to Exercise Its Jurisdiction Is Not Subject to Judicial Control in the Absence of Proof That the Board Acted Arbitrarily or Capriciously

The language of the National Labor Relations Act, the statutory scheme as a whole, its legislative history and the uniform holdings of this and other courts establish that the Board is vested with complete discretion as to when to assert its jurisdiction. The only applicable limitations are those imposed by the due process clause of the Fifth Amendment to the Constitution of the United States in its requirement that agencies of government must not act discriminatorily or arbitrarily and by Section 10(e)(B)(1) of the Ad-

ministrative Procedures Act in its direction to courts to set aside agency action found to be "arbitrary, capricious," and "an abuse of discretion" (5 U.S.C. 1009(e)(B)(1)). The controlling decision in this Court is *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 1940, 309 U.S. 261. There this Court reviewed the pertinent statutory language, the scheme of the Act, and its legislative history at length. It concluded that the Board, not the courts, and not any private party, was given exclusive power to determine whether unfair labor practices should be remedied. Before setting forth the basis for this conclusion, this Court pointed out that Congress could confer such broad discretion on administrative agencies. Thus this Court stated (309 U. S. at 264):

> "Within the range of its Constitutional power, Congress was entitled to determine what remedy it would provide, the way that remedy should be sought, and the extent to which it should be afforded, and the means by which it should be made effective."

This Court then considered each step of the administrative procedure provided by the Act, and pointed to the statutory language and legislative history which established the Board's full discretion as to whether to proceed. This Court said (309 U. S. at 265, 266, 270):

> "Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief. The Board as the public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the

instrument to assure protection from the described unfair conduct * * * .

"When the Board has made its order, the Board alone is authorized to take proceedings to enforce it * * * . Again, the Act gives no authority for any proceedings by a private person or group, or by any employee or group of employees, to secure enforcement of the Board's order. The vindication of the desired freedom of employees is thus confided by the Act, by reason of the recognized public interest, to the public agency the Act creates * * *.

* * *

"If the decree of enforcement is disobeyed, the unfair labor practice is still not prevented. The Board still remains as the sole authority to secure that prevention * * *. As the court has no jurisdiction to enforce the order at the suit of any private person or group of persons, we think it is clear that the court cannot entertain a petition for violation of its decree of enforcement save as the Board presents it."

Similarly in *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 1951, 341 U.S. 675, 684 this Court stated:

"Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case."

Again in *N.L.R.B.* v. *Indiana & M. Electric Co.*, 1943, 318 U. S. 9, 18, 19, this Court said:

"The Board has wide discretion in the issue of complaints * * *. It is not required by the statute

to move on every charge; it is merely enabled to do so."

In *United States* v. *Morton Salt Co.*, 1950, 338 U. S. 632, 647-648, speaking of the powers of the Federal Trade Commission, this Court stated:

> "We know that unquestioned powers are sometimes unexercised from lack of funds, motives of expediency, or the competition of more immediately important concerns."

For similar statements by lower courts see *Hotel Employees Local* v. *Leedom*, D. C., D. C. 1957, 39 LRRM 2276 and cases there collected. That court stated:

> "There can be little, if any question that the Congress intended to lodge in the Board, rather than in the courts, a determination of what employer-employee relationships so affect interstate commerce as to require the exercise of the powers granted to the Board."

That Congress was fully aware of this construction of the statute by the Board and the courts when it enacted the Labor Management Relations Act, was noted by the United States Court of Appeals for the Ninth Circuit in *Haleston Drug Stores, Inc.* v. *N.L.R.B.*, 9 Cir., 1951, 187 F. 2d 418, certiorari denied, 342 U. S. 815. There the court stated (187 F. 2d at 420-422):

> "The courts have uniformly recognized that the National Labor Relations Act did not confer private rights, but granted only rights in the interest of the public to be protected by a procedure looking solely to public ends. The proceeding authorized to be taken by the Board was not for the

adjudication or vindication of private rights. * * *

"By the express language of § 10(a) the Board was and still is *empowered* (not directed) to prevent persons from engaging in unfair labor practices affecting commerce. Its discretionary authority in respect of its assertion of jurisdiction was never, so far as we are informed, questioned under the Act as it existed prior to 1947. * * * The Board itself, without judicial challenge, acted on the assumption that it could, for reasons of policy or for budgetary or other reasons, decline to issue an unfair labor practice complaint, or to dismiss a complaint after issuance without determining the existence of an unfair practice, if in its reasoned judgment the policies of the act would be best served by that course. Of this assumption and practice one cannot doubt that Congress was fully cognizant.

* * * *

"Section 10 of the original act, embracing six subdivisions (a) to (f), dealt with the procedure for the prevention of unfair labor practices. So far as pertinent to the present inquiry its language was left undisturbed by the 1947 legislation. Nothing was added to the section suggestive of an intent on the part of Congress to circumscribe or curtail the Board's authority in respect to the prevention of such practices, or to render less flexible the unfair labor practice provisions of the original Act." (Emphasis the court's)

The same court, in deciding *N.L.R.B.* v. *Townsend*, 9 Cir., 1950, 185 F. 2d 378, 383, certiorari denied, 341 U.S. 909, stated:

"Providing the Board acts within its statutory and constitutional power it is not for the courts to say when that power should be exercised. Many

factors such as lack of funds or the imminence of a more drastic disruption of commerce in another industry might dictate that in a particular case powers explicitly granted should not be exercised."

For an excellent review of court and Board decisions sustaining the Board's exclusive power to determine whether the "burden on commerce" in any given instance, in the light of other demands on the Board's staff and funds, justifies an administrative remedy, see *Local Union No. 12, Progressive Mine Workers of America, District No. 1* v. *N.L.R.B.*, 7th Cir., 1951, 189 F. 2d 1, certiorari denied 342 U. S. 868.

B.

The Express Reference to Labor Organizations in Section 2(2) of the Act Was Solely for the Purpose of Exempting Their Usual Activities With Respect to Employees of Industrial Employers From Proscription and Not for the Purpose of Removing Such of Their Activities as Remained Subject to the Act From the Same Discretionary Jurisdiction as Applied to the Activities of All Other Employers

The sole reason for any reference at all to labor organizations in the definition of employers was to preclude the possibility of the Act being used against unions in instances where their organizing tactics directed at employees of other employers were regarded as intimidatory or coercive of employees in their right to exercise a free choice as to whether or not to join a union. This explanation was stated in the Senate Report on the 1934 bill, the Committee comparison of the 1934 bill with the 1935 bill, and again in the Senate Report on the 1935 bill which became the National Labor Relations Act (see quotations therefrom set forth, pp. 62-66, *supra*). Except for the desire to protect unions from the use of the Act against them in such situations, the definition of em-

ployer would have made no mention of labor organizations. The Congressional intent manifested by the reference to labor organizations in Section 2(2) is wholly exclusionary in character.

The fortuity that the draftsmen of the provision for the exclusion of labor organizations were unable to find a single phrase which exactly measured the exclusion desired and used the legislative device of first "taking away" a larger category than desired, then "putting back" a portion thereof, affords not the slightest basis for inferring any Congressional intent that the portion "put back" is to be treated differently from what it would have been if it had never been "taken away". Without regard to whether Congress intended to exclude trade union employers as such or only as business employers, if the draftsmen could have phrased the definition of "employer" to include "all employers except those functioning in a trade union capacity," no argument could be made that Congress singled out trade unions when functioning in other than a trade union capacity for the mandatory exercise of the Board's jurisdiction because it treated them differently from other employers.

The day has long since passed when the use of the positive rather than the negative, or the use of an exclusion rather than an inclusion, served as a criterion of statutory construction. The purpose of the provision, not its form, is controlling. From the face of Section 2(2) the entirely exclusionary character of the labor organization reference is beyond doubt. The legislative history is in accord.

Indeed, instead of showing that Congress wished to impose a mandatory duty on the Board to proceed

against all unfair labor practices committed by unions against their own employees, the legislative history shows just the opposite. No witness before Congress, no member of Congress, no one anywhere, so far as the legislative history showed, even considered whether the Act should be applicable to relations between a union engaged solely in traditional trade union activities and its own employees. Two witnesses raised the theoretical possibility that if unions went into business on an extensive scale there might be need to apply the Act to them (see pp. 60-61, *supra*). That possibility was regarded as so remote that the committee showed uncertainty as to whether there was any point in covering it. This uncertainty appears in the action of the committee in including the parenthesis in the bill as reported in May 1934, stating it was unnecessary and hence had been taken out in March 1935, and then putting it in again in the bill reported in May 1935 (see pp. 62-65, *supra*).

The National Labor Relations Act contains no provision which limits the Board's discretion in deciding which unfair labor practices to remedy. Neither on the basis of one type of unfair labor practice being more harmful than another nor on the basis of one type of employer being more important in the achievement of the policies of the Act, is there any direction to the Board to proceed mandatorily rather than discretionarily.

Specific statutory mention affords no appropriate basis for fixing standards for the Board's appropriate exercise of its discretionary jurisdiction. The specific reference to special groups usually results from their characteristics which raise special problems as to whether or not they should be included. Any rule

requiring that mandatory discretion be exercised over the specific groups whose special status required their express cataloguing into the large basic groups reverses sound sense. Under such a test borderline cases where opinion as to inclusion or exclusion was divided or where ambiguity required specificity would displace the cases at which the Act was primarily directed.

Several illustrations based on present Board practices show how fallacious it is to assume that even a particularly strong manifestation of Congressional intent to include within the Act displaces Board discretion as to whether to assert jurisdiction. Congressional intent to include as employers subject to the Act persons employing four, three, two or even just one employee was strongly manifested. Attempts to exclude employers of less than 10 employees were vigorously and overwhelmingly repelled.[19] Yet the Board's present "dollar yardstick," measuring impact on commerce in such terms as a $3,000,000 gross requirement for local utilities, a $1,000,000 indirect interstate inflow, a $500,000 direct interstate inflow, etc.,[20] rarely brings an employer of ten or less employees before the Board.

The Congressional intent to confer on the Board plenary jurisdiction in the territories without any limitation based on the absence of effect on commerce between the territory and the outside world, was manifested in the clear statutory provisions of Section 2(6). Openly recognizing this to have been the Congressional

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[19] See Leg. His. N.L.R.A. 1935, pp. 94, 269-270, 299, 593, 625-626, 733, 1085, 1099, 1102, 1119, 1320, 1342.

[20] For an up-to-date compilation of the Board's "dollar yardstick" see Bureau of National Affairs, Labor Relations Expediter (loose leaf service) 310a-311.

intent, the Board nevertheless exercises its discretion by applying the same "dollar yardstick" to the territories as it applies within the states.[21]

The Board never has power to proceed against any employer unless Congress manifested an intent to include that employer within the Act. If Congressional intent to include imposed a mandatory jurisdiction, the Board's discretionary jurisdiction would be nonexistent. The manner in which Congressional inclusion was effectuated has no logical relevance to whether the Board should exercise its discretion or not.

Both the court below (R. 263-264) and Chairman Farmer and Board Member Peterson (R. 233a) rejected the argument that mention of labor organizations in Section 2(2) deprived the Board of the power it admittedly would otherwise have had to decline to proceed against labor organizations. Their judgment in this respect was eminently sound.

C.

The Determination of the Board That the Standards Which It Applies to Nonprofit Organizations Generally, Are Applicable to Labor Organizations, Was Neither Arbitrary Nor Capricious

All of the arguments which we have heretofore advanced (pp. 53-55) in showing that the noncommercial activities of labor organizations are in the same category as the noncommercial activities of other nonprofit organizations, are fully applicable here. If the noncommercial activities of any nonprofit organization

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[21] *Union Cab Co.*, 1954, 110 NLRB 1921, 1922 (Alaska); *Virgin Isles Hotel*, 1954, 110 NLRB 558, 559; *Sixto Ortega*, 1954, 110 NLRB 1917, 1918 (Puerto Rico); *Cantera Providencia*, 1954, 111 NLRB 848 (Puerto Rico).

are subject to the jurisdiction of the Board, there can be no doubt that Congress did not intend for the Board to exercise such jurisdiction (see pp. 48-52, *supra*).

The Brief for Petitioner, pp. 20-22, argues that unions as such do not engage in businesses and hence the Board's standard amounts to an exemption of all labor organizations from the Act. The statement is not factually accurate but even if it were, it is irrelevant. As we have pointed out heretofore (pp. 60-61, *supra*) witnesses testified before Congress that unions did go into business and should be subject to the Act as employers when they did so. Prominent instances of unions going into business had occurred during the decade preceding the enactment of the Act (see n. 11, pp. 61-62, *supra*).

Whether at the present time unions engage in businesses without incorporating seems likewise immaterial In the first place the Act remains available and the Board stands ready to apply it to unions if they do embark on business ventures. In the second place, the use of a corporate device to hold title to real estate or to operate a business, would not prevent the Board from proceeding against a labor organization, either as the sole respondent or jointly with the corporation, if it should appear that the labor organization was responsible, in whole or in part, for the violations of the Act.[22]

The Board issued an unfair labor practice order against a union as an employer in *Otter Trawlers*

[22] Cf. *Bethlehem Steel Corp.*, 1939, 14 NLRB 539, 611, enforced D.C. Cir. 1941, 120 F. 2d 641, 650, where the parent corporation and sole stockholder of the direct employer was held liable as an employer.

Union, Local 53, 1952, 100 NLRB, 1187, 1195, where the union engaged in a deep sea fishing business included in its membership boat owners and captains as well as their employees, and important policy-making officers and officials of the union were employers or supervisory captains. The unfair labor practices of the union as an employer were directed against the employees of its members.

At least two other Board cases involved unions engaged in businesses. There is the *Bausch & Lomb* case, 108 NLRB 1555 (discussed pp. 77-79, *supra*) where the Board disqualified a union from representing the employees of an optical firm because the union had established a competing optical business. The *Intermediate Report on Guayama Bakers,* 1951, 27 LRRM, 1322, 1323[23] discloses a union engaged in a baking business.

We have not been able to find any collection of current instances of unions operating businesses. A most cursory search for such instances has produced the following:

The United Mine Workers of America is at the present time a part owner of American Coal Shipping, Inc., a company set up by the United Mine Workers, coal producers and several railroads to increase coal export trade to Europe.[24]

The Seafarers International Union in the early

[23] The case is not officially reported because no exceptions to the intermediate were filed and the Board did not issue a formal decision.

[24] New York Times, February 5, 1957, p. 50, vol. 1.

1950's carried on a business of selling blankets, dungarees and tobacco to sailors.[25]

The International Typographical Union publishes a daily newspaper, Labor's Daily.

The International Association of Machinists has just built a large office building at the corner of Connecticut Avenue and N Streets in Washington, D. C., a large part of the space in which is to be rented commercially.

The old Machinists Building located at 9th and Massachusetts Avenue, N. W. in Washington, D. C., has been purchased by the American Federation of State, County and Municipal Workers which rents to others most of the space commercially.

The Bowen Building at 821 - 15th Street, N. W., Washington, D. C., is owned directly by and operated as a commercial office building by the Bricklayers, Masons and Plasterers International Union.

The Brotherhood of Painters owns and operates on a commercial basis an office building in Lafayette, Indiana.

The International Printing Pressman and Assistants Union of North America owns and operates on a commercial basis a hotel in Colorado Springs, Colorado.

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[25] Nations Business, July 1955, pp. 46, 48-50. The union was charged with and consented to the entry of a decree based on alleged violation of the Federal anti-trust laws. *U.S.* v. *Seafarers Sea Chest Corp.*, U.S. D.C.E.D. N.Y., 1954 Civ. Docket No. 14674. The charge was that the union was monopolizing the market by requiring ships to exclude all persons except the Union from selling to sailors employed by such ships.

At various times unions have owned and operated banks,[26] radio stations[27] and a host of other businesses.[28]

D.

Appraisal of All Relevant Factors Such as the Board's Limited Budget, Small Staff, Large Backlog, the Resultant Presence in Large Areas of Industry of Unremedied Unfair Labor Practice Having a Substantial Impact on Commerce, the Slight Impact on Commerce of Unfair Labor Practices Committed by Unions Against Their Own Staff Members, the Strong Non-Legal Deterrents to Such Conduct by Unions and the Availability of Interunion Machinery for Adjusting Such Disputes, Demonstrates That the Board's Failure to Assert Jurisdiction over the Amici Curiae Was Proper

The National Labor Relations Board in the case of *Breeding Transfer Co.*, 1954, 110 NLRB 493, 497, listed the factors which the Board considered in exercising its discretion with respect to whether or not to assert jurisdiction. The factors as there listed are as follows:

> "(1) the problem of bringing the case load of the Board down to manageable size,
>
> "(2) the desirability of reducing an extraordinarily large case load in order that we may give adequate attention to more important cases,
>
> "(3) the relative importance to the national economy of essentially local enterprises as against

[26] Harry A. Millis and Royal E. Montgomery, Organized Labor (1945), pp. 344-352; J. B. S. Hardman and Maurice Neufeld, The House of Labor, N. Y., 1951, pp. 315-318.

[27] J. B. S. Hardman and Maurice Neufeld, *op. cit.*, pp. 327-328.

[28] Florence Peterson, American Labor Unions (1945), pp. 35-37, 177-178; Business Week, Jan. 1, 1955, p. 56; Nations Business, July 1955, pp. 46, 48-50; Herbert Harris, American Labor (Yale Univ., 1939), pp. 250, 336-338; Selig Perlman and Philip Taft, History of Labor in the United States, 1896-1932 (MacMillan, 1935), pp. 572-579.

those having a truly substantial impact on our economy, and

"(4) overall budgetary policies and limitations."

The "dollar yardstick" (see p. 95, *supra*) now followed by the Board has left a large area in which unfair labor practices having a substantial impact upon commerce remain without any remedy. None of the unfair labor practices of a local public utility or transit system are remedied unless an annual business in excess of $3,000,000 is done by the employer. None of the unfair labor practices of most radio and television stations are remedied for very few meet the Board's dollar yardsticks (see National Labor Bureau, Labor Relations Expediter (loose leaf service) 310b). None of the unfair labor practices of businesses having a direct inflow of less than $500,000 or an indirect inflow of less than $1,000,000 are remedied. And so on down the line. Throughout industries in which units are smaller than the "dollar yardstick" requirements, flagrant unfair labor practices are being committed daily.

The issue posed by this case, and each other novel and infrequent case, becomes one of whether public funds should be diverted to its handling, thereby reducing funds available for the policing of industry. When confronted with a case having as slight an impact on commerce as the instant one, how could the Board properly take jurisdiction when so many thousands of really flagrant unfair labor practices throughout vast areas of industry remain unremedied for want of staff and funds to handle them?

The Board's decision not to assert jurisdiction is justified not only by the relative triviality of the impact

on commerce of unfair labor practices by a union against its own staff members, but also by the existence of other deterrents and remedies for such unfair labor practices. Unions have their own codes of fair conduct with respect to their employees. They have machinery for settling jurisdictional disputes.[29]

All relevant factors support the Board's determination not to exercise jurisdiction here.

E.

The Proscriptions of the Taft-Hartley Act Against Discrimination Against Anti-Union Employees or Pro-Rival Union Employees, If Applied to Labor Organizations in Their Relationships to Their Staff Engaged in Traditional Trade Union Activities, Could Defeat the Whole Purpose of the Statute

The issue posed by the record is not whether employees of a trade union may form an independent union confined to themselves and then bargain with the employing union. Rather the issue is whether the law compels a trade union not to discriminate against the violently anti-union or pro rival union employee in the hiring and firing of union organizers, negotiators or assistants to officers and agents of the union. For the Taft-Hartley Act protects the right to oppose unions or support rival unions equally with the right to form and join any other unions.

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[29] See John T. Dunlop, Jurisdictional Disputes, Proceedings of New York University, Second Annual Conference on Labor (1949), p. 477; B. Aaron, Jurisdictional Disputes—Union Machinery for Settling, 5 Labor Law Journ. 258, 262, 289 (April 1954). That the instant case presented a jurisdictional dispute falling within the settlement machinery of unions see statement of counsel for petitioner during oral argument before the Board, quoted pp. 78-79, *supra*.

Any literal application of the proscription on discrimination against anti-union employees to unions in employment of a staff to conduct its traditional trade union functions, could cripple all unions. Anti-union employers could send anti-union applicants around to the union offices every time a staff vacancy occurred. A union faced with charges of discriminating because of union activity or sympathy in rejecting all such applicants would obviously have a difficult time in proving its selection was not motivated by the desire to discriminate in favor of those most devoted to the union and its objectives.

Both Congress and the Board recognize the proscriptions of the Act are inapplicable to industrial employers in relations with their labor policy personnel (see pp. 70-75, *supra*) and where employees join a union which conducts a business in competition with the employer (see pp. 77-78, *supra*). The following of a parallel rule in respect to labor organizations could not be an abuse of discretion.

CONCLUSION

For the foregoing reasons it is urged that this Court should affirm the judgment below and sustain the order of the Board dismissing all complaints against the *amici curiae.*

Respectfully submitted.

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